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MUNICIPAL CORPORATION CASES

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING MUNICIPAL CORPORATIONS
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

VOLUME II.

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MUNICIPAL CORPORATION CASES.

VOLUME II.

CITY OF RICHMOND

v.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(*Supreme Court of the United States, May 22, 1899.*)

Telephone Companies—Right to Use Post Roads—Construction of Federal Act.*—The act of congress of 1866, conferring upon telegraph companies the right to construct, maintain and operate lines of telegraph over and along any of the post roads of the United States, has no application to telephone companies whose business is that of electrically transmitting articulate speech between different points.

ON Writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit.

C. V. Meredith and *H. R. Pollard*, for appellant.

Hill Carter, *A. L. Holladay*, and *George H. Fearons*, for appellee.

MR. JUSTICE HARLAN, delivered the opinion of the court.

The principal question in this case is whether the circuit court and the circuit court of appeals erred in holding that the appellee was entitled to claim the benefit of the provisions of the act of congress approved July 24, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230. Case Stated.

By that act—the provisions of which are preserved in sec-

*See note at end of case.

tions 5263 to 5268, inclusive, title 65, of the Revised Statutes of the United States—it was provided:

"Section 1. That any telegraph company now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress, and over, under or across the navigable streams of waters of the United States: provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"Sec. 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the postmaster general.

"Sec. 3. that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person: provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said

companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the postmaster general of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the postmaster general, of the restrictions and obligations required by this act."

14 Stat. 221, c. 230.

Subsequently, by an act approved June 8, 1872, all the waters of the United States during the time the mail was carried thereon, all railways and parts of railways which were then or might thereafter be put in operation, all canals and all plank roads, and all letter carrier routes established in any city or town for the collection and delivery of mail matter by carriers, were declared by congress to be "post roads." 17 Stat. 308, c. 335. These provisions are preserved in section 3964 of the Revised Statutes of the United States.

By an act approved March 1, 1884, "all public roads and highways, while kept up and maintained as such," were declared to be "post routes." 23 Stat. 3, c. 9.

Proceeding under an act of the legislature of New York of April 12, 1848, and acts amendatory thereof, certain persons associated themselves on the 11th day of December, 1879, under the name of the Southern Bell Telephone and Telegraph Company. The articles of association stated that the general route of the line or lines of the company should be from its office, in the city of New York, "by some convenient route, through or across the states of New Jersey, Pennsylvania, Delaware, Maryland and Virginia, or otherwise, to the city of Wheeling or some other convenient point in the state of West Virginia, and thence to and between and throughout various cities, towns, points and places within that part of the state of West Virginia lying south of the Baltimore and Ohio Railroad, and within the states of Virginia, North

Carolina, South Carolina, Georgia, Alabama and Florida, the said line or lines to connect the said cities of New York and Wheeling together, and the said other cities, towns, points and places, or some of them, or points within the same, together or with each other or with said cities of New York and Wheeling."

By an ordinance passed by the city of Richmond on the 26th day of June, 1884, it was provided: "(1) Permission is hereby granted the Southern Bell Telephone and Telegraph Company to erect poles and run suitable wires thereon, for the purpose of telephonic communication throughout the city of Richmond, on the public streets thereof, on such routes, as may be specified and agreed on by a resolution or resolutions of the committee on streets, from time to time, and upon the conditions and under the provisions of this ordinance. (2) On any route conceded by the committee on streets, and accepted by the company, the said company shall, under the directions of the city engineer, so place its poles and wires as to allow for the use of the said poles by the fire alarm and police telegraph, in all cases giving the choice of position to the city's wires, wherever it shall be deemed advisable by the council or the proper committee to extend the fire alarm and police telegraph over such route. (3) The telephone company to furnish telephone exchange service to the city at a special reduction of ten dollars per annum for each municipal station. (4) No shade trees shall be disturbed, cut or damaged by the said company in the prosecution of the work hereby authorized without the permission of the city engineer and consent of the owners of property in front of which such trees may stand first had and obtained; and all work authorized by this ordinance shall be, in every respect, subject to the city engineer's supervision and control. (5) The ordinance may at any time be repealed by the council of the city of Richmond; such repeal to take effect twelve months after the ordinance of resolution repealing it becomes a law."

The Code of Virginia adopted in 1887 (section 1287) provided that "every telegraph and every telephone company

incorporated by this or any other state, or by the United States, may construct, maintain and operate its line along any of the state or county roads or works, and over the waters of the state, and along and parallel to any of the railroads of the state, provided the ordinary use of such roads, works, railroads and waters be not thereby obstructed; and along or over the streets of any city or town, with the consent of the council thereof."

Under date of February 13, 1889, the Southern Bell Telephone & Telegraph Company filed with the postmaster general its written acceptance of the restrictions and obligations of the above act of July 24, 1866.

The present suit was brought by that company in the circuit court of the United States against the city of Richmond.

The bill alleged that the plaintiff was engaged in the business of a "telephone" company, and of constructing, maintaining, and operating "telephone" lines in, through, and between the states of Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida; that it had been so engaged for a period of about 15 years, during which time it had continuously maintained at various places in said states and in Richmond, Va., an exchange, poles, wires, instruments, and all other apparatus and property necessary for the maintenance and operation of "telephones and telephone lines," and had erected and maintained through and along the certain streets and alleys of that city numerous poles and wires for conducting its business; that it had so conducted its business and erected and maintained its lines, wires, and poles under and by authority of the common council and board of aldermen of the city of Richmond, the legislature of Virginia, and acts of the congress of the United States; that its "telephone" wires and poles were used by its subscribers, in connection with the Western Union Telegraph Company, under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages;

that its business was in part interstate commerce by reason of its connections with the above telegraph company; and that its status was that of a telegraph company under the laws of the United States and of the state of Virginia and of other states of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York.

The plaintiff also alleged that it had accepted the act of congress of July 24, 1866; that by virtue of such acceptance it became entitled to construct, maintain, and operate lines of telephones over and along any of the military roads and post roads of the United States which had then been or might thereafter be declared such by law; that the streets, alleys, and highways of the city of Richmond are post roads of the United States; that the several departments of the government of the United States located in Richmond have used in that city the plaintiff's electrical conductors, and other facilities for the transmission of instructions, orders, and information to officers and persons in the administration of governmental affairs and on other business throughout the several states and the District of Columbia and in foreign countries; that under and by virtue of the Virginia Code, § 1287, the plaintiff was authorized and empowered to construct, maintain, and operate its lines of poles and wires, with necessary facilities, along and over the streets of any city or town in Virginia, with the consent of the council thereof, and under and by virtue of the power and authority therein conferred, all of which was additional to the right given by the above act of congress, it maintained and operated its lines in the streets of the city of Richmond, and had in all respects complied with the legal obligations and requirements imposed; that, relying upon its right to erect, maintain, and operate its lines along and over the streets and alleys of Richmond, it entered upon said streets and alleys, and had conducted its business and executed its contracts, of which a large number were in force, to furnish and afford "telephonic" facilities to the

residents of Richmond, and to persons outside of the city of Richmond, and with the officers and agents of the federal government; and that under the act of congress of 1866 it was and is entitled to maintain and operate its lines through and over the streets and alleys of the city of Richmond, "without regard to the consent of the said city, and it did in fact locate many of its poles and wires and begin the operation of its business without applying to the said city for permission to do so."

The bill then referred to an ordinance of the city approved July 18, 1891, and alleged that it was in conflict with the plaintiff's rights, and void. It referred also to a subsequent ordinance of December 14, 1894, repealing the ordinance of June 26, 1884, granting the right of way through the city to the plaintiff, and providing "that, in accordance with the fifth section of said ordinance, all privileges and rights granted by said ordinance shall cease and be determined at the expiration of twelve months from the approval of this ordinance by the mayor."

Reference was also made in the bill to two ordinances passed September 10, 1895, by one of which it was provided, among other things: "(1) That all poles now erected in the streets or alleys of the city of Richmond for the support of wires used in connection with the transmission of electricity, except such as support wires required by the city ordinances to be removed and run in conduits, shall hereafter be allowed to remain only upon the terms and conditions hereinafter set forth. (2) No pole now erected for the support of telephone wires shall remain on any street in said city after the 15th day of December, 1895, unless the owner or user of such pole shall first have petitioned for and obtained the privileges of erecting and maintaining poles and wires for telephone purposes in accordance with the conditions of this ordinance, and such other conditions as the council may see fit to impose. And if such owner, failing to obtain such privilege as above required, shall neglect or fail to remove such pole or poles and telephone wires supported thereon from the streets

or alleys of the city by the 20th day of December, 1895, and restore the street to a condition similar to the rest of the street or alley contiguous thereto, the said owner shall be liable to a fine of not less than five nor more than one hundred dollars for every such pole so remaining in the street or alley, to be imposed by the police justice of the city; each day's failure to be a separate offense."

By the other ordinance of September 10, 1895, it was, among other things, provided: "The city council will grant permission to any company, corporation, partnership or individual to place its wires and electrical conductors in conduit under the surface of said streets of the city. Any such individual, partnership, corporation or company desiring such permission shall petition to the council therefor. Such petition shall name the streets, alleys and the side and portions thereof to be used and occupied by such conduits, and shall submit maps, plans and details thereof to accompany such petition."

The bill contains additional allegations to the effect:

That the fifth section of the ordinance of 1884 was null and void; that the ordinances referred to were unreasonable, *ultra vires*, and unconstitutional: that the plaintiff was entitled, "independent of and superior to the consent of the city of Richmond," to "construct, maintain, and operate" its lines "over and along" the streets of that city; that telephone companies and their business were embraced by the terms of the act of congress, and that, in fact, telephone and telegraph companies were, for the purposes embraced by that act, one and the same; that the the post roads spoken of in the act were not limited to routes on the public domain, but embraced all post roads of the United States that had been or might hereafter be declared such by congress; that, the streets and alleys of the defendant being post roads, the plaintiff had the right, under the act of congress, "to occupy the streets and alleys of the city of Richmond for its purposes, guarantied to it by the constitution and laws of the United States, superior to any power in the said city to

prevent it from so doing"; and that it "claims not only the right to maintain its present poles and wires along the streets and alleys now occupied by it, but to extend them to other streets and alleys, as its business and the business interests of the country and its patrons may require."

The city demurred to the bill of complaint, but the demurrer was overruled. 78 Fed. 858.

An answer was then filed, which met the material allegations of the bill, and the cause was heard upon the merits.

In the circuit court a final decree was entered in accordance with the prayer of the bill, as follows: "The court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion, and doth adjudge, order, and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of congress of the United States approved July 24, 1866, (which is an authority paramount and superior to any state law or city ordinance in conflict therewith), the right 'to construct, maintain, and operate its lines over and along' the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along said streets and alleys, as well as to maintain, construct, and operate the same, and to connect its lines with new subscribers along said streets and alleys; and the said city of Richmond, its agents, officers, and all others are enjoined and restrained from cutting, removing, or in any way injuring said lines, poles, and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. And the court doth adjudge, order, and decree that the defendant do pay to the complainant its costs in this suit incurred to be taxed by the clerk, and this cause is ordered to be removed from the

docket, and placed among the ended causes, but with liberty to either party hereto on ten days' notice to the other to reinstate this cause on the docket of this court, on motion, for the purpose of enforcing and specifically defining, should it become necessary, their respective rights under this decree."

The city asked that the decree be modified by inserting therein after the words "construct and operate the same" the following words: "So far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the state of Virginia, or to be sent beyond the said limits;" and by inserting therein after the words "interfering with the exercise of the aforesaid rights by the complainant company" the following words: "So far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the state of Virginia, or to be sent beyond said limits." But counsel for complainant objected, and the court (using the language of its order), "intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character," refused to so modify the decree.

Upon appeal to the circuit court of appeals it was held that the plaintiff came within the protection and was entitled to the privileges of the act of congress of July 24, 1866; and that under that act it had the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States; and "when an effort is made or threatened to deal with it as a trespasser it can refer to that act."

The circuit court of appeals also held that the privileges so granted were to be enjoyed in subordination to public and private rights, and that the municipality could establish lawful provisions regulating the use of the highways mentioned in the act of congress. "This being so," that court said, "the injunction granted by the circuit court is too broad in its language and effect. There should have been the

recognition of a proper exercise of the police power by the municipal corporation, and the use by the complainant of its poles and lines should have been declared to be subject to such regulations and restrictions as may now or may be hereafter imposed by the city council of Richmond, in the proper and lawful exercise of the police power." 42 U. S. App. 686, 697, 698, 28 C. C. A. 659, and 85 Fed. 19.

The decree of the circuit court was reversed, and the cause was remanded to that court, with instructions to modify the terms of the injunction therein granted so as to conform to the principles declared in the opinion of the circuit court of appeals. JUDGE BRAWLEY concurred in the result, but was not inclined to assent to so much of the opinion as held that a telephone company, such as was described in this case, and whose business was local in character, was within the purview of the act of congress of July 24, 1866, relating to telegraph companies.

The case is now before this court upon writ of *certiorari*.

The plaintiff's bill, as we have seen, proceeded upon the broad ground that it is entitled, in virtue of the act of congress of 1866, to occupy the streets of Richmond with its lines without the consent—indeed, against the will—of the municipal authorities of that city. That, it would seem, is the ground upon which the decree of the circuit court rests, for it was declared by that court that the plaintiff had the right, under the provisions and protection of that act, to construct, maintain, and operate its lines over and along the streets and alleys of Richmond, both those then occupied by the plaintiff company and those not then so occupied, and to put up, renew, replace, and repair its lines, poles, and wires over and along such streets and alleys, and to maintain, construct, and operate the same, as well as to connect its lines with the new subscribers along the streets and alleys of the city.

The circuit court of appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866, —a question to be presently considered,—adjudged that the rights and privileges granted by that act were to be enjoyed

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The circuit court of appeals, while holding that the plaintiff was entitled to avail itself of the provisions of the act of 1866, —a question to be presently considered,—adjudged that the rights and privileges granted by that act were to be enjoyed

in subordination to public use and private rights, and subject to any lawful exercise of the police power belonging to the state, or to one of its municipalities. This was in accordance with what this court had adjudged to be the scope and effect of the act of 1866.

In Telegraph Co. *v.* Attorney General, 125 U. S. 430, 548, 8 Sup. Ct. 961, it was held that the act of 1866 was a "permissive" statute, and that "it never could have been intended by the congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

In City of St. Louis *v.* W. U. Tel. Co., 148 U. S. 92, 100, 13 Sup. Ct. 485, which involved the question whether a corporation proceeding under the act of 1866 could occupy the public streets of a city without making such compensation as was reasonably required, it was said to be a misconception to suppose that the franchise or privilege granted by the act of 1866 carried "with it the unrestricted right to appropriate the public property of a state. It is, like any other franchise, to be exercised in subordination to public as to private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the federal goverment to a corporation, state or national, to construct interstate roads or lines of travel, transportation, or communication, would authorize it to enter upon the private property of an individual, and appropriate it, without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under

the grant of franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a state. It would not be claimed, for instance, that under a franchise from congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the state, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the state, and property whose ownership and control are in the state, and it is not within the competency of the national government to dispossess the state of such control and use, or appropriate the same to its own benefit or the benefit of any of its corporations or grantees, without suitable compensation to the state. This rule extends to streets and highways. They are the public property of the state. While, for the purposes of travel and common use, they are open to the citizens of every state alike, and no state can, by its legislation, deprive a citizen of another state of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another state, or a corporation of the national government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what the exclusive appropriation is taken, whether for steam railroads or for street railroads, telegraphs, or telephones, the state may, if it chooses, exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

But independently of any question as to the extent of the authority granted to "telegraph" companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act.

The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the federal court, was the business transacted by using what is commonly called a "telephone," which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company in 1879, as "an instrument for electrically transmitting or receiving articulate speech."

Our attention is called to several adjudged cases, in some of which it was said that communication by telephone was communication by telegraph. Attorney General *v.* Edison Tel. Co., 6 Q. B. Div. 244, 255; Chesapeake & P. Tel. Co. *v.* Baltimore & O. Tel. Co., 66 Md. 399, 7 Atl. 809; Wisconsin Tel. Co. *v.* City of Oshkosh, 62 Wis. 32, 21 N. W. 828; Duke *v.* Telephone Co., 53 N. J. Law, 341, 21 Atl. 460; Cumberland Tel. & Tel. Co. *v.* United Electric Ry. Co., 42 Fed. 273. Upon the authority of those cases it is contended that the act of congress should be construed as embracing both telephone and telegraph companies.

The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the postmaster general by certain acts of parliament as to the transmission of "telegrams." The court held that the postmaster general was entitled, looking at the manifest objects of those acts, and under a reasonable interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether tele-

phone companies, although not specifically mentioned in a certain general law of that state, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in anyway, "or for any lawful business or purpose whatever." The New Jersey case involved the question whether a company organized under the act of that state to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate, and maintain such telegraph, telephone, and other lines necessary for the speedy transmission of intelligence along and over the public ways and streets of the cities and towns of that state. It was held in that case that a telephone company, under its right to construct and operate a telegraph, was empowered by statute to establish a telephone service. None of those cases involved a construction of the act of congress, and the general language employed in some of them cannot be regarded as decisive in respect of the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

It may be that the public policy intended to be promoted by the act of congress of 1866, would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that, if the telephone had been known and in use when that act was passed, congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which

articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, congress, in 1866, knew only of the invention then and now popularly called the "telegraph." When, therefore, the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.

In 1887 the postmaster general submitted to the attorney general the question whether a telephone company or line, offering to accept the conditions prescribed in title 65 of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Atty. Gen. Garland replied: "The subject of title 65 of the Revised Statutes is telegraphs. In all its sections the words 'telegraph', 'telegraph company,' and 'telegram,' define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the postmaster general, who has charge of the mail service. Under the several sections embraced in the title, in consideration of the right of way and the grant of the right to pre-empt 40 acres of land for stations at intervals of not less than 15 miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the government. Governmental communications to all distant

points are almost all, if not all, in writing. The useful government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony, as now understood, was little known as to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies therefore are not within the 'category of the grantees of the privileges conferred by the statute.' If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative, rather than administrative, power." 19 Op. Attys. Gen. 37.

It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not and could not have been at that time, within the contemplation of congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the states, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in the city, as the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the act of congress, relating only to telegraph

companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the state. But, even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of congress relating in terms only to "telegraph" companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of congress upon implication merely, particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions. If congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech, —that is, to companies popularly known as "telephone companies," and never otherwise designated in common speech, —let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

Something was said in argument as to the power of congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary to express any opinion. We now adjudge only that the act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points.

What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a

Note

question which the circuit court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction.

The decree of the circuit court of appeals, so far as it reverses the decree of the circuit court, is affirmed, and the cause is remanded with directions for such further proceedings in the circuit court as may be in conformity with the principles of this opinion and consistent with law.

It is so ordered.

NOTE.

Telephone as Telegraph.—The decision in the leading case is a departure from the general trend of authority, it having been heretofore held that, in the absence of express statutory provisions, the telephone was to be considered a telegraph. Cumberland Telephone, etc., Co. *v.* United Electric R. Co., 43 Am. & Eng. R. Cas. 194; Roake *v.* American Telephone, etc., Co., 12 Am. & Eng. Corp. Cas. 342, 41 N. J. Eq. 35; Roberts *v.* Wisconsin Telephone Co., 77 Wis. 589, 20 Am. St. Rep. 143; State *v.* Central New Jersey Telephone Co., 35 Am. & Eng. Corp. Cas. 1, 53 N. J. L. 341; Chesapeake, etc., Telephone Co. *v.* Baltimore, etc., Tel. Co., 16 Am. & Eng. Corp. Cas. 213, 59 Am. Rep. 167, 66 Md. 399; Iowa Union Telephone Co. *v.* Board of Equalization, 67 Iowa 250; Att'y Gen. *v.* Edison Telephone Co., 6 Q. B. Div. 244, 29 Moak's Rep. 602; New Orleans, etc., R. Co. *v.* Southern, etc., Tel. Co., 53 Ala. 211; Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Bell Telephone Co. *v.* Com. (Pa.), 3 Atl. Rep. 825; State *v.* Bell Telephone Co., 36 Ohio St. 296, 38 Am. Rep. 583; Northwestern Tel. Exch. Co. *v.* Chicago, M. & St. P. Ry. Co. (Minn.),13 Am. & Eng. R. Cas., N. S., 449. In this case the court said: "The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph, unless express statutory provisions govern the case. So the courts have almost universally held that telephone companies are engaged in public business, have the same public duty of serving the community, and may, when establishing their lines, exercise the right of eminent domain under the constitution and the laws. See the cases cited 25 Am. & Eng. Enc. Law, 745, and notes. Also Cumberland Telephone & Telegraph Co. *v.* United Electric Ry. Co., 42 Fed. 273; Chesapeake & P. Tel. Co. *v.* Baltimore

& O. Tel. Co., 66 Md. 399, 7 Atl. 809; Hudson River Tel. Co. *v.* Watervliet Turnpike & Railway Co., 135 N. Y. 393, 32 N. E. 148. No valid distinction can be made between federal and state legislation on the subject. So that the act of congress in reference to telegraph lines over and along post roads, before referred to, must, in our opinion, include telephone lines where applicable at all."

PEASE

v.

INHABITANTS OF PARSONSFIELD.

(*Supreme Judicial Court of Maine, Dec. 29, 1898.*)

Authority of De Facto Officers.*—A highway surveyor *de facto*, acting under color of authority, may bind the town, within the scope of his authority, in favor of the public or third persons.

Defective Highway—Sufficiency of Notice.—Actual notice to such officer of a defective highway 24 hours prior to injury therefrom is sufficient.

Case at Bar.—The court refuses to set aside a verdict for the plaintiff under the following conditions: It was none too large. The issues of fact were stoutly contested. A careful reading of the evidence does not show that the verdict is wrong. Differences of opinion may well exist as to its correctness, but it is a verdict of the jury, and commands the respect of the court.

(Official.)

EXCEPTIONS by defendants from York county supreme judicial court. *Motion for new trial and exceptions overruled.*

Case Stated.

The injury resulted from the failure of defendants' *de facto* highway surveyor to remedy a defect in a highway, consisting of an uneven ridge of ice across it.

Upon the subject of notice, defendants made the following admissions in court: "It is admitted upon behalf of the defendants that George P. Davis was at the time one of the

*See *note*, 1 Mun. Corp. Cas. 222.

selectmen of the town of Parsonsfield, and that on or about May, 1895, the selectmen of the town placed in his [Merrill's] hands the surveyor's book for the district in which this road was located, and that the book contained the written appointment of Merrill as surveyor of that district, and signed by a majority of the selectmen. It is also admitted that George P. Davis, P. W. Benton, and Brackett T. Lord were selectmen of the town at this time."

There was evidence for plaintiff showing that Merrill retained possession of the surveyor's book until after the injury to plaintiff's horse, and until the taxes embraced therein were worked out under his supervision; that Merrill had personal knowledge of the defect several days prior to the injury; and that two other municipal officers, prior to the injury, knew of the defective condition of the highway at the point where the accident occurred.

The jury were instructed that notice to Mr. Merrill would be notice to the defendant town, although he had not taken the official oath.

Argued before PETERS, C. J., and EMERY, HASKELL, WHITEHOUSE, and STROUT, JJ.

J. O. Bradbury and *J. Merrill Lord* for plaintiff.

B. F. Hamilton and *B. F. Cleaves*, for defendants.

HASKELL, J. Case to recover damages for injuries to a traveler's horse, suffered from a defective highway. Verdict for plaintiff for $144.97. The defendants have an exception to the instruction of the presiding justice, upon evidence that made the same pertinent: That if the municipal officers of defendant town, or a majority of them, gave a written appointment to one Merrill, signed by a majority of them, as highway surveyor for the road district where the injury was received, and he took the surveyor's book, and performed the duties of surveyor, and caused the taxes to be worked out, during the season of 1895, and until after the accident occurred, he would be a highway surveyor *de facto*, within that district, and that 24 hours'

Defective Highway—Sufficiency of Notice.

actual notice to him prior to the injury would bind the town.

This instruction was well enough, for Merrill, apparently clothed with authority, performed the functions of the office, and the fact that he had not been sworn could make no difference. He was an officer *de facto*,—that is, acting under color of authority; and, so far as the public or third persons are interested, his acts were just as valid and binding as if he had been an officer *de jure*. Town of Plymouth *v.* Painter, 17 Conn. 585, and cases cited; Smith *v.* State, 19 Conn. 493. In Woodbury *v.* Inhabitants of Knox, 74 Me. 462, a school agent, chosen at a meeting that had not been duly notified, and not sworn, employed a teacher; and it was held that his act was binding upon the town. See, also, Brown *v.* Lunt, 37 Me. 423; Inhabitants of Belfast *v.* Inhabitants of Morrill, 65 Me. 580. In Woods *v.* Inhabitants of Bristol, 84 Me. 358, 24 Atl. 865, there was an attempt to usurp an office, not to fill one under color of right. Bunker *v.* Inhabitants of Gouldsboro, 81 Me. 188, 16 Atl. 543, is not in point.

Authority of De Facto Officers.

The jury found a verdict for the plaintiff. It was none too large. The issues of fact were stoutly contested. A careful reading of the evidence does not show that the verdict is wrong. Difference of opinion may well exist as to its correctness. It is a verdict of the jury, and commands our respect. We are not disposed to overturn it.

Case at Bar.

Motion and exceptions overruled.

QUIMBY

v.

FILTER *et ux.*

(*Court of Errors and Appeals of New Jersey, April 3, 1899.*)

Defective Sidewalks—Avoiding Injury—Due Care.*—One passing along the sidewalk of a public street must use such care and circumspection as the circumstances require; and it is error to instruct a jury that ordinary care to avoid danger need only be used, if the danger is known or seen.

LIPPINCOTT, LUDLOW, and ADAMS, JJ., dissenting.

(Syllabus by the Court.)

ERROR by defendant to Hudson county circuit court. *Reversed.*

Charles C. Black, for plaintiff in error.
Wm. H. Speer, Jr., for defendants in error.

COLLINS, J. The judgment removed in this cause was recovered (on a verdict) by Ira S. Filter and wife for injuries sustained by Mrs. Filter through falling into an opening in the sidewalk of a public street in Jersey City, from which opening a flight of steps led to the cellar of a building owned at the time of the accident by Dr. Isaac N. Quimby, the defendant's intestate, who died during the trial of the action brought against him. The errors assigned are based on exceptions taken at the trial. Those needing consideration challenge the submission of the case to the jury, and the ruling of the judge on the subject of contributory negligence.

It is not disputed that, if an opening in a public street is not properly guarded, it is a nuisance; nor that, if such nuisance inhere in the permanent structure of a building, responsibility for its maintenance rests on the owner. It is

*See note at end of case.

urged in this case that in the construction of the building the cellar stairway was properly guarded; that its guards became impaired through the default of a tenant in exclusive possession of the building, and bound to make repairs; and that, therefore, the tenant only was liable. The proof showed, however, that at the time of the last renewal of the demise the condition of the property was the same as at the time of the accident. It is settled in this state that by a renewal of lease the owner of demised premises may come under responsibility for the continuance of a nuisance, although there is no actual change of possession, and the tenant is bound to make repairs. Responsibility is undeniable, if the owner at the time of the renewal has knowledge of the condition that constitutes the nuisance. Ingwersen *v.* Rankin, 47 N. J. Law, 18, approved Rankin *v.* Ingwersen, 49 N. J. Law, 481, 10 Atl. 545. Whether such knowledge is essential to responsibility need not be considered; for that question was not raised at the trial, and there was proof sufficient to warrant a jury's inferring it. The defect proved had existed a considerable time before the renewal of the lease, and was open and visible, in a public street. Dr. Quimby lived in Jersey City, and was familiar with the property. He testified at the trial, and did not disclaim knowledge of its condition.

Nor upon the question of whether the accident was due to lack of proper safeguards could the court take the case from the jury. The opening of the cellar steps was originally guarded on the sides by iron railings, one of which had been broken away. Which railing was gone was a matter of dispute, as was also the position of certain merchandise of the tenant placed along the building, which was supposed to effectually guard the side of the opening from which the railing was missing. The evidence that the opening was unguarded on the side towards which Mrs. Filter approached it was very slight, but sufficient to go to the jury. The sidewalk was 14 feet wide, and the cellar steps descended, transversely thereto, from an opening about 4 feet square

adjoining the side of the building. The street ran north and south. Mrs. Filter, with a Mrs. Tietjen and her young daughter, were passing along the sidewalk, coming from the north. It was after nightfall, but the street was well lighted. In some way or other, Mrs. Filter was precipitated to the foot of the cellar steps, and received bodily injury. The only witnesses to the accident called for the plaintiffs were Mrs. Filter and Mrs. Tietjen. Mrs. Filter said that she did not know how she came to fall, nor from what point, she fell; but, in a confused and uncertain way, she testified that it was the north guard rail that was gone, and that she was close to the building when she fell. Mrs. Tietjen testified that the first knowledge she had of the accident was that Mrs. Filter had disappeared, and that she then saw her down at the foot of the steps. She differed from Mrs. Filter as to which guard rail was gone. A number of witnesses to the accident were called for the defendant. They testified that, as Mrs. Filter's party walked along, they were laughing and "fooling," and pushing one another, and that Mrs. Filter fell or was pushed down the steps from the front. Most of defendant's witnesses testified that the north guard rail was intact, and that it was the south rail that was gone. In rebuttal, the conduct ascribed to Mrs. Filter's party was denied by each of them. On this state of proof, it was not error to refuse to withdraw the case from the jury; but on the subject of contributory negligence there was such misdirection as must avoid the verdict and consequent judgment. The judge instructed the jury that Mrs. Filter was not bound to use ordinary care as she passed along the sidewalk, unless there was some means of warning, or the "pitfall" was guarded. This instruction was afterwards modified as follows: To a request to charge that if Mrs. Filter knew of the existence of the dangerous place, or if it was open and obvious to the sight, she was bound to use reasonable care to avoid the danger, the judge responded by saying that, if she saw the dangerous place, she would be bound to use ordinary care to avoid the danger. He broadened this rule by charging a

request, that, if she knew or saw the dangerous place, she would be guilty of contributory negligence in not avoiding it; but in response to a request to charge that she was guilty of contributory negligence if she did not see the "cellarway," provided she would have seen it by exercising ordinary care, and, seeing it, was guilty of contributory negligence in not avoiding it, provided she could have avoided it by exercising ordinary care, he said: "I refuse to charge the above, as repetition. Of course, if she saw the hole, it was her duty to avoid it." The effect of these instructions was to emasculate the defense of contributory negligence. Ordinary care is every one's duty. I can hardly conceive of a case where no care at all need be exercised. What is ordinary care will depend upon the circumstances, and is for the jury's determination. The adjudged cases all recognize the necessity for the use of ordinary care while walking on the sidewalk of a public street, if recovery is to be had for injury due to the maintenance of a nuisance; and recognize, also, that failure to exercise such care may defeat a recovery, although the existence of the nuisance, and its attendant danger, may be unknown to the pedestrian. In the leading case of Durant *v.* Palmer, 29 N. J. Law, 544, it was held in this court that it was not necessarily negligent for a plaintiff who fell into an unguarded areaway to have walked towards a show window without observing the condition of the sidewalk; but it was also held that the question of his negligence in so doing was for the jury. In Association *v.* Giles, 33 N. J. Law, 260, it was assumed that it was a proper question for the jury whether a plaintiff who fell into an unguarded and unlighted areaway by night had exercised that degree of care which was in her power, and which might reasonably be expected from a person in her situation under the circumstances in which she was placed. A like assumption underlies the decision in Houston *v.* Traphagen, 47 N. J. Law, 23, where it was held proper to leave to the jury the question of the negligence of a lad who, in the daytime, attracted by the

Note

contents of a druggist's window, failed to notice, and stepped into, an unguarded opening in the sidewalk. It was said that whether or not such conduct was negligent depended on circumstances. In all such cases, of course, the burden of proof that negligence of the person injured contributed to the injury is on the defendant; but the question of such negligence, if raised, must be determined, and that question is always for the jury, if, in any aspect of the case, such negligence may be fairly inferred. Of course, the degree of care exacted by the law from one walking on that part of the sidewalk of a public street devoted wholly to pedestrians is much less than that required on other parts of the highway; and the degree of care differs, also, with respect to the character of the use by others of the sidewalk, —whether lawful or unlawful. These differences are well illustrated by MR. JUSTICE DEPUE in the opinion read in the case of Express Co. *v.* Nichols, 33 N. J. Law, 434, decided in this court. But ordinary care is exacted, and, except in a perfectly clear case, the court should always leave it to the jury to inquire whether there was such circumspection as under the circumstances an ordinarily careful man would exercise. It is common knowledge that adjacent to the buildings on a city street there are various appendages for their convenient use that project into the sidewalk. It might well be that Mrs. Filter, with due circumspection, measured by the standard of ordinary care, would have avoided the accident that befell her, although she did not previously see or know exactly the danger of such an accident. It was error to limit the jury in their inquiry on that subject. I shall vote for a reversal and a *venire de novo*.

LIPPINCOTT, LUDLOW, and ADAMS, JJ., dissenting.

NOTE.

Defective Streets—Care to Be Exercised by Traveller.—A person passing along a city street is not required to be on the lookout for danger, but has the right to assume that the city will perform its

duty to keep the street in safe and proper condition, and is required to exercise only ordinary care, unless he knows of a defect in the street, or might, by the exercise of ordinary care, know of it. Gordon *v.* Richmond (Va.), 18 Am. & Eng. Corp. Cas. 251; Jordan *v.* Hannibal, 87 Mo. 673, 15 Am. & Eng. Corp. Cas. 246; Plattsmouth *v.* Mitchell, 20 Neb. 228, 15 Am. & Eng. Corp. Cas. 233; Birmingham *v.* Starr, 112 Ala. 98; Van Praag *v.* Gale, 107 Cal. 438; Dooley *v.* Meriden, 44 Conn. 117, 26 Am. Rep. 433; Robinson *v.* Wilmington, 8 Houst. (Del.) 409; Chicago *v.* Babcock, 143 Ill. 358; Indianapolis *v.* Gaston, 58 Ind. 224; Edwards *v.* Three Rivers, 107 Mich. 153; Jennings *v.* Van Schaick, 108 N. Y. 530, 2 Am. St. Rep. 459.

LAMB

v.

CITY OF CEDAR RAPIDS.

(*Supreme Court of Iowa, May 25, 1899.*)

Defective Streets—Liability of Municipalities.*—A municipal corporation may be liable for defects and obstructions outside of the traveled part of a street which has been opened to the public, but left in its natural state.

Preponderance of Evidence.—It may have been misleading to charge that "by a preponderance of the evidence is meant the greater weight and value of the evidence, and not the greater number of witnesses," but defendant was not prejudiced thereby as the greater number of witnesses testified for plaintiff.

Damages—Instructions.—That portion of the charge giving a rule for ascertaining damages for loss of future earnings was somewhat indefinite, but was not opened, as defendant contended, to the objection that it did not give any such rule, and, as defendant did not request a more definite direction on the subject, and the jury seemed to have understood such rule, such direction must be held to have been sufficient.

Same—Same.—In an action for personal injuries, it was error to direct the jury to "consider * * * the expenses, if any, for nursing," as there was no evidence upon which an estimate for such an allowance could have been made.

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*See Boltz *v.* Town of Sullivan (Wis.), 1 Mun. Corp. Cas. 203 and *note*, p. 213 *et seq.*

Lamb *v.* City of Cedar Rapids

APPEAL by defendant from Linn county district court. *Affirmed.*

Warren Harman, *J. J. Powell*, *John N. Hughes*, and *Powell & Harman*, for appellant.

Chas. A. Clark & Son, for appellee.

ROBINSON, C. J. In March, 1895, the plaintiff, while assisting in the loading of a piano onto a dray in a street of the defendant, fell upon the stump of a small tree, and received severe injuries. He alleges that the accident occurred at a place where there was business property on each side of the street, and that it was the duty of the defendant to keep the street at that point in a safe condition for the transaction of business, and free from dangerous defects and obstructions of every character which might interfere with the use of the street; that the stump referred to constituted a defect and an obstruction in the street, and a source of danger, for which the defendant was responsible. The answer pleads contributory negligence on the part of the plaintiff, and avers that the stump was not in a part of the street worked and used for public travel, but in a part allowed by the defendant to the owners of adjoining property for use as a street park.

Case Stated.

1. The appellant first complains of a refusal of the court to give an instruction, a copy of which is as follows: "First. The testimony shows without contradiction that some years prior to the alleged injury the city council of the city of Cedar Rapids, defendant in this action, had passed an ordinance granting property owners in said city owning lots abutting or lying along streets eighty feet wide the right to use twenty feet of the street next to their property for the purpose of parks or grass plats, and such property owners had the right to use that part of the street next to their lots for the purpose of beautifying the same in different ways, including the right to plant shade trees and make grass plats. It also appears that Third street west was eighty feet wide at the place of the alleged injury. Therefore the property owners

on each side of the street where the alleged injury happened were entitled to occupy so much of the street as abutted on their respective lots; such occupation being limited to twenty feet from the lot line, leaving forty feet in the central portion of the street for vehicles and teams, and being further limited to the uses set forth in the ordinance which has been introduced in evidence. If you find that up to the time of the alleged injury the city authorities had never worked or improved the west twenty feet of Third street west between Eighth and Ninth avenues, but left that part of the street in its natural condition, then you will find for the defendant, unless you find that the city authorities had failed to provide a reasonably safe roadway of sufficient width to accommodate the public travel on that part of the street." The first part of the instruction is sustained by the evidence, and the last part refers to the place of the accident, and the jury would have been authorized to find that the stump was within the part of the street which the defendant had authorized the owner of the adjoining property to use for the purpose of a street park, and which the defendant had not improved, and that a reasonably safe roadway of sufficient width had been provided in the street, but outside the space the use of which for a park had been authorized. Some of the evidence tended to show that the street had never been parked nor curbed at the place of the accident, although there was a shallow gutter at some distance from the lot line and sidewalk at about the place where the outer line of the parking, had it been constructed, would have been; that hitching posts had been placed within that line and near the sidewalk; that a small business house was located on an adjoining lot; and that the street at the place of the accident was traveled and used for all the ordinary purposes of a street. It may be conceded, for the purpose of this case, that the duty of the defendant to keep its streets in reasonably good condition, free from defects and obstructions dangerous to the public, extends only to so much of each street as is customarily used by the public.

Defective Streets —Liability of Municipalities.

See Stafford *v.* City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Fulliam *v.* City of Muscatine, 70 Iowa, 436, 30 N. W. 861; 9 Am. & Eng. Enc. Law, 385; Tied. Mun. Corp. § 346. But it is not true that a municipal corporation is not liable for the defects and obstructions in a street left in its natural condition which has been opened to public use. The corporation may be under as great obligation to remedy a defect or to remove an obstacle in one case as in the other. Hence, as the jury might have found from the evidence submitted, that the portion of the street in question had been opened to public travel, and that it was the duty of the defendant to keep it in a reasonably safe condition, the district court properly refused to give the instruction we have set out. The court charged the jury that if the defendant, having had sufficient notice of the alleged defect, in the exercise of reasonable care ought to have removed or remedied it, then the defendant did not discharge the duty which the law imposed upon it, and, as applied to the evidence, we think that was correct. See Stafford *v.* City of Oskaloosa, 64 Iowa, 251, 20 N. W. 174; Foshay *v.* Town of Glen Haven, 25 Wis. 288; North Manheim Tp. *v.* Arnold, 119 Pa. St. 381, 13 Atl. 444; 2 Dill. Mun. Corp. § 1008; Elliott, Roads & St. 447. Much of what we have said applies to the second and third instructions asked by the defendant and refused by the court. We do not think the court erred in not giving either of them. Some of the instructions asked by the defendant and refused were based in part upon the theory that the owner of the lot in front of which the accident occurred was using that portion of the street as a park. Our attention has not been called to any evidence which tends to show that such use of any part of the street was being made at that time, while the fact appears to have been that it was used for the ordinary purposes of a street. If it was so used, it was the duty of the defendant to keep it in reasonably safe condition for that purpose.

2. The appellant complains of a portion of the third paragraph of the charge given, on the ground that the court usurped the functions of the jury, and decided that the stump

in question was a defect for which the defendant was liable, if it had sufficient notice to have removed it before the accident occurred; but an examination of the entire paragraph shows that the complaint is not well founded. Whether the stump constituted a defect which the defendant ought to have removed was submitted to the jury to decide.

3. The court charged the jury that "by a preponderance of the evidence is meant the greater weight and value of the evidence, and not the greater number of witnesses." That statement is in a sense correct, but is not to be commended, for the reason that in some cases it might be misleading, or at least confusing. A preponderance of the evidence may or may not be given by the greater number of witnesses. But prejudice to the defendant could not have resulted in this case, for the reason that the greater number of witnesses testified for the plaintiff.

Preponderance of Evidence.

4. The seventh paragraph of the charge to the jury was as follows: "In making up your verdict, if you find for the plaintiff, you will consider the ability of the plaintiff to earn wages and perform labor prior to the time of the alleged injury, as shown by the evidence, and also his ability to earn wages and perform labor since receiving the alleged injury, the time he lost, if any, because of said injury, the expenses, if any, for medical treatment and nursing, and the physical pain and mental anguish, if any, you find he has suffered on account of the injury, and allow plaintiff such amount as you believe from the evidence he is justly entitled to; but, in arriving at the amount, if any, you allow for loss of future earnings, you will take into consideration the fact that such amount, if any, will be paid in a lump sum, and you will only allow for the present worth or value of the same." The defendant complains of that paragraph on two grounds, the first of which is that it does not give any rule for estimating the amount to be allowed for loss of future earnings. We said in Fry *v.* Railroad Co., 45 Iowa, 416, of an instruction which directed the jury to allow the plaintiff in that case

"such damages as will fairly compensate her for all past, present, or future physical suffering or anguish, which is, has been, or may be caused by said injury" that it was too broad, and permitted the jury to enter the domain of conjecture, and indulge in speculation to a greater extent than was allowable; that the jury should have been directed that it could look alone to the evidence, and determine therefore what damage it was reasonably certain the plaintiff would sustain in the future; and that an allowance could not be made for damage which might but was not reasonably certain to ensue. In the case of Kendall *v.* City of Albia, 73 Iowa, 241, 34 N. W. 833, it appeared that the court had charged the jury that if the plaintiff in that case, as a result of an accident there in question, had "by reason of said accident suffered bodily pain and mental anguish to the present, and will so suffer in the future, then for such pain and anguish, past, present, and future, you should allow him such sum as you think proper, under the evidence, without proof of any special sum." That was modified, however, by the following: "With reference to future damages, you should be satisfied from the evidence that they will probably be sustained by the plaintiff." And we held that the two instructions, construed together, were correct. In Ford *v.* City of Des Moines, 75 N. W. 630, we considered the part of a charge which authorized a recovery for the impairment of power to enjoy life by reason of an injury, "and for such pain and inconvenience and impairment of enjoyment for such time as the same has been or may continue, as shown by the evidence in the future, if any," and held it to be erroneous for the reason that it authorized the jury to allow for that which was merely possible, not for what the evidence showed was reasonably certain to continue. The charge under consideration is not quite so definite and certain as were the two considered in the case of Kendall *v.* City of Albia, *supra*; but it is not correct to say that no rule whatever for ascertaining future damages was given.

Damages—Instructions.

The direction to allow plaintiff "such amount as you believe from the evidence he is justly entitled to" referred as well to future as to past damages, and required the jury to make such an allowance for future damages as it believed from the evidence he should have. The jury must so have understood the paragraph, and, in the absence of a request for a more definite instruction, it was sufficient. It is further insisted that paragraph was erroneous in directing the jury to "consider * * * the expenses, if any, for nursing," for the reason that the evidence did not show that the plaintiff incurred any expense for nursing, nor that the services rendered were of any value. The only evidence in regard to nursing was given by a witness who stated that he helped to take care of the defendant, and helped to dress his wound. It is not shown how much the witness did, nor that any compensation for his services had been made or was expected, and the evidence would not have authorized an allowance for nursing. In Reed v. Railroad Co., 57 Iowa, 23, 10 N. W. 285, the district court directed the jury, in case it found for the plaintiff, to allow for "expenses reasonably incurred for medical care and attention," and we held it reversible error for the reason that there was no evidence upon which an estimate for such an allowance could have been based. In the case of Stafford v. City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668, we held that an instruction which directed the jury, in estimating damages, to consider the expenses incurred by the plaintiff for his treatment by surgeons and physicians was erroneous for the reason that there was no evidence which tended to show what expenses, if any, the plaintiff had incurred for that purpose. Whether the error was sufficient to have authorized a reversal on that ground alone was not stated. The portion of the charge in this case under consideration did not peremptorily direct the jury to allow for expenses incurred in nursing, in case it found for the plaintiff, as was done in regard to the expenses in question in the Reed Case, but merely instructed the jury to consider the ex-

Same—Same.

pense, if any, incurred for nursing. In that respect it differed from the instructions held to be erroneous in both the cases cited. We think it was erroneous in referring to expenses for nursing, but that in consequence of the limited words "if any," and the character of the testimony respecting such expenses, the error could not have been prejudicial.

5. The appellant urges numerous objections to instructions refused, and to portions of the charge given, to which we have not referred specifically. It is sufficient to say that some of the objections urged are disposed of by what we have already said, and others are not of sufficient importance to receive separate mention. Whether the plaintiff was negligent was a question properly submitted to the jury. It may be that he should be charged with knowledge of the stump before he was hurt, as he had worked near it for some minutes before the accident occurred; but the evidence tends to show that the piano had been loaded upon a dray, and that in order to change the position of the piano it was moved towards the rear end of the dray. The plaintiff was at that end, pulling on the piano, and another man was at the other end, pushing. The piano moved more easily than the plaintiff had anticipated, he lost his hold, and fell backward onto the stump. We cannot say that the jury was not authorized to find the plaintiff free from negligence, in view of all the facts in the case. We do not think the verdict was contrary to the charge of the court, nor that it lacks support in the evidence. The judgment of the district court is affirmed.

BADGLEY

v.

CITY OF ST. LOUIS.

(*Supreme Court of Missouri, Dec. 23, 1898.*)

Actions for Torts—Conflict between Charter and General Statute.—A city cannot, under a constitutional grant to it of power to adopt a system of laws for its own government, regulate the practice and proceedings in the courts of the state in actions against the city, or against the city and others, for injuries caused by obstructions in its streets.

Streets—Obstructions—Liability of City.*—In an action for injuries to plaintiff's horse resulting from a fall over a pile of rubbish which had been accumulating from time to time for several weeks, the liability of the city could be predicated only upon its negligence in not causing the removal of the rubbish within a reasonable time after it was chargeable with notice that the rubbish had accumulated to such an extent as to render the street unsafe.

Measure of Damages.—In such action the measure of damages was the difference in value of the horse immediately before and after the injury and a reasonable sum for the loss of the use of the animal while it was disabled.

Excessive Verdict.—The verdict was excessive, it appearing from plaintiff's evidence that the aggregate of the items of damages mentioned therein was considerably less than the sum awarded.

APPEAL by defendant from St. Louis circuit court. *Reversed.*

Case Stated.

The city of St. Louis appeals from a judgment against it for $200. The suit is for damages on account of an injury to a horse belonging to plaintiff, which resulted from certain obstructions which said city permitted to remain in one of its streets. The action was begun before a justice of the peace against the Farmers' Elevator Company and the city of St. Louis. The trial there resulted

*See *notes*, 1 Mun. Corp. Cas, 475 *et seq.*

in a judgment for the elevator company, but against the city. The latter appealed. The plaintiff took no appeal from the judgment rendered in favor of the elevator company. An amended statement was filed in the circuit court, and in the caption thereof the names of both defendants were mentioned. The court struck therefrom "The Farmers' Elevator Company," holding that it was no longer a party to the suit. The gravamen of the complaint is that dirt, rubbish, and other obstructions were placed in Madison street, in said city, between Main street and the levee, and were negligently permitted by the city to remain there for two or three weeks prior to the 7th of November, 1892, unguarded, and without any light or other warning to persons traveling along said street at night; and that said street at that point was thereby rendered unsafe and dangerous. The complaint further charges that during the night-time on the 7th of November, 1892, he was driving upon said street, and while he was in the exercise of due care his horse came in contact with said obstruction so carelessly permitted to remain in the street by the defendants, and was caused thereby to fall down, and received serious injuries. It is further alleged that said horse, in consequence thereof, "became permanently injured, and damaged to the extent of $100, and that by reason of said injury to said horse as aforesaid, the said horse could not be used for a space of four months subsequent thereto, and that said plaintiff was damaged by the loss of the use of said horse in the sum of $50; that the plaintiff expended in the care of said horse the sum of $50 while injured as aforesaid." Judgment was asked for $200. When the cause came on for trial in the circuit court, plaintiff was called as a witness in his own behalf, and testified that in 1892 he was in the express business in St. Louis. The defendant here interposed an objection to the introduction of any evidence on the ground that the petition failed to state a cause of action against the city of St. Louis, "and on the further ground that the suit was originally brought against the city and the Farmers' Elevator Company, and, the case having been

dismissed as against the elevator company, and judgment having been rendered against the city, the latter took an appeal, and no appeal was taken by plaintiff from the judgment of dismissal entered by the justice in favor of the elevator company: and that by reason thereof, and of the facts set forth in the petition, which shows that, if the city was liable, so also was the elevator company, therefore, under the charter of the city of St. Louis, no right of action exists against the city of St. Louis." This objection was overruled, and the trial proceeded. Plaintiff introduced testimony to the effect that there was a pile of dirt and rubbish near the middle of Madison street, about 2½ feet high, and about 7 feet long. There was no light at the place, and while he was driving along the street he could not see this obstruction, and drove his horse into it. The horse was thrown down, and "got tangled up in the harness, and the shafts ran into his shoulder, and crippled him." Plaintiff employed a veterinarian to attend to his horse at a cost of $20. The use of the horse was worth $20 a month, and plaintiff was deprived of him for nearly three months on account of the injury. His value was about $125 before the accident, and from $20 to $25 afterwards. The dirt and rubbish had been piled in the street for three or four weeks before the horse was hurt, and there was no light there that night. At the close of the plaintiff's case the city offered a demurrer to the evidence, which the court refused. Defendant then proved that the obstruction was placed in the street by men working for the Farmers' Elevator Company. A policeman stated that he saw these parties piling the dirt upon the street, and that they had been piling it there from time to time for three or four weeks. It had been accumulating for that long. It was not all put there at one time. He notified the elevator people to remove it, but did not report the condition of the street. He did not say that all of the pile of rubbish was placed in the street by the elevator employees, but he saw them throwing dirt there at different times. The court, at plaintiff's request, and over

the defendant's objection, gave to the jury this instruction: "The court instructs the jury that if they believe, from the evidence in this case, that the defendant, the city of St. Louis, permitted dirt and other obstructions to be placed and remain on Madison street, between Main street and the levee, in the city of St. Louis, Missouri, and to remain there for three or four weeks prior to the 7th day of November, 1892, and that said dirt and other obstructions were so piled upon said street upon the 7th day of November, 1892, as to make the same dangerous for any citizen traveling along said public street, and using ordinary care in so doing, and that the horse and wagon of the plaintiff, without any negligence on the part of the plaintiff, while traveling said street, ran upon said pile of dirt and rubbish, which caused said horse to fall, and thereby maim and injure himself, then the jury will find in favor of the plaintiff for such sum as they may believe from the evidence that the said horse was damaged or injured, and for such additional sum as was reasonable, expended for the care of said horse, and the reasonable value of the use of said horse during the time he could not be used by reason of such injury." The court refused an instruction asked by defendant, as follows: "The court instructs the jury that if they believe, from the evidence, that any other person or persons, company or companies, have been negligent in piling up the rubbish, etc., complained of, they will find for defendant, the city of St. Louis." There was a verdict for plaintiff for $200, and, after an unsuccessful motion for a new trial, this appeal followed:

B. Schnurmacher and *Alex. Nicholson*, for appellant.
Collins & Jamison, for respondent.

WILLIAMS, J. (after stating the facts). 1. This case presents an important question of practice in cases wherein the city of St. Louis is a party, which deserves, and has received, our careful consideration. The point was pressed at the trial, both by an objection to the introduction of evidence and in the instructions asked by defendant, and it is renewed

here, that, as plaintiff failed to obtain a judgment against the Farmers' Elevator Company, whose servants put the obstructions complained of in the street, the judgment against the city cannot stand. Reliance for this position is placed upon the following section of the charter of said city: "Whenever the city shall be made liable to an action for damages, by reason of the unauthorized or wrongful acts, or of the negligence, carelessness or unskillfulness of any person or corporation, and such person or corporation shall also be liable to an action on the same account by the party so injured, the injured party, if he sue the city for damages suffered by him, shall also join such other person or persons or corporation so liable, if residing in the state, so that they can be served by process, as a defendant or defendants in his suit, and no judgment shall be rendered against the city unless judgment is rendered against such other person or corporation so liable to be sued as aforesaid; and if any action be brought against the city alone, and it is made to appear that any person or corporation ought to be joined as a defendant in the suit, according to the provisions of this section, the plaintiff shall be non-suited; but no person shall be liable under this act to be sued jointly with the city, who would not be liable to be sued separately, irrespective of its provisions. When a judgment shall be obtained against the city and the other party liable as aforesaid, execution shall issue against all the defendants in the ordinary form, but shall first be enforced and collected of the other defendants and shall not be collected of the city unless the other defendants are so insolvent that the same cannot be made out of them, and in that case the city shall only pay so much of the judgment as cannot be made out of the other defendants." The above provision in the charter of the city of St. Louis was not enacted by the general assembly of the state. It is not contained in any statute passed by the legislature. Said charter was framed by a board of 13 freeholders, by express authority of section 20 of article 9 of the constitution, which empowered said board to prepare

a charter for the "government of the city" in harmony with, and subject to the constitution and laws of Missouri. The charter so prepared was, in accordance with constitutional requirements, submitted to by the qualified voters of said city, and was ratified by a majority of these voting at an election held for that purpose. It became, 60 days after said election, the organic law of the city, and superseded the former charter granted by the legislature, and all amendments thereto. The question now confronting us is the validity of the charter requirement hereinbefore quoted. Has the city of St. Louis, under the constitutional grant to it of power to adopt a system of laws for "the government of the city," authority to regulate the practice and proceedings in the courts of the state in ordinary common-law actions against said city, or against said city and others, as is attempted in the section above copied? Shall the charter prevail in such cases, or must the statutes of the state govern? This provision was before this court in Donoho *v.* Iron Works, 75 Mo. 401, but it was not necessary to consider its validity in that case. It was up again in Merrill *v.* City of St. Louis, 83 Mo. 244. Plaintiff there had joined, as a defendant, the party whose wrongdoing was the cause of the injury. It therefore became unnecessary to pass upon the power of the city to require such joinder. The last time it was presented was in Wiggin *v.* St. Louis, 135 Mo. 558, 37 S. W. 528. It was there decided that plaintiff was entitled to his judgment against the city notwithstanding the lower court had erroneously instructed the jury that the party sued jointly with the city was liable; thereby, as appellant contends, rendering the charter provision of but little practical effect. It will be observed that in none of these cases was the plaintiff defeated because of a failure to follow the direction of the section under consideration. We are asked to reopen the matter, and re-examine the questions decided in the Wiggin Case, *supra*. We find, upon turning to the Revised Statutes of 1889, that this provision of the charter

Actions for Torts —Conflict between Charter and General Statute.

the evidence the said horse was damaged or injured." This furnished no rule by which such damages could be estimated or ascertained, nor did it give the element that should enter into the computation. Hawes *v.* Stock-Yards Co., 103 Mo. 60, 15 S. W. 751. As the case must be retried for other reasons, this instruction can be made to conform to the one which respondent claims it was intended to follow, and which was approved by this court in Streett *v.* Laumier, *supra*.

Third. The point made by defendant in the motion for a new trial, that the verdict is excessive, seems, too, to be well taken. An examination of plaintiff's evidence, and the testimony offered by him in support of his case, clearly shows that the aggregate of the items of damages mentioned by him and his witnesses is considerably less than the sum awarded him by the jury. We think that the case should be retried, and it is accordingly remanded for that purpose. All concur, except MARSHALL, J., who, having been of counsel in the case, took no part in the decision.

DEVENISH

v.

CITY OF SPOKANE.

(*Supreme Court of Washington, April 18, 1899.*)

Defective Sidewalk—Constructive Notice.*—The fact that a sidewalk has been in a dangerous condition for a month or longer renders the city chargeable with notice of its condition.

APPEAL by defendant from Spokane county superior court. *Affirmed.*

A. G. Avery and *F. M. Dudley*, for appellant.
Mount & Merritt, for respondent.

REAVIS, J. Respondent recovered judgment for damages for injury to her person occasioned by a defective sidewalk

*See *notes*, 1 Mun. Corp. Cas. 474 *et seq.*

on Pine street in the city of Spokane. The defect was a broken board. The respondent, in company with two other ladies, was walking over the sidewalk on the 12th of July, 1897, and one of her companions stepped on a broken plank in such a way as to cause the broken plank to rise and trip her, causing her to fall, from which she was injured. There seems to be no discussion here over the amount of the damages awarded for the injuries. There is substantial testimony to sustain respondent's complaint. The following instruction by the court is assigned as error: "Upon the question of notice to the city, the court instructs you that, if you find from the evidence that the sidewalk in question on Pine street was in a dangerous condition at the time of the injury complained of, and had been in that condition anywhere from one to four months before that time, then I instruct you that it is not necessary that actual notice to the city be shown; constructive notice is sufficient. If such condition was in existence for such a length of time that the city authorities, by the exercise of ordinary diligence, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances, the law imputes notice to the city. Failure to discover and remedy a dangerous defect in a public sidewalk or street, within a reasonable time, is itself negligence." The instruction submitted to the jury the question of constructive notice. The court seemed to assume that, if the broken plank had existed in the sidewalk for from one to four months before the injury, it was not necessary to show actual notice to the appellant city of such defect; that is, that constructive notice was then sufficient. With this meaning attached to the instruction, it was not erroneous.

In Lorence *v.* City of Ellensburgh, 13 Wash. 341, 43 Pac. 20, it was observed: "Counsel insists that there is no proof showing that appellant had notice of the defective condition of the sidewalk. There was evidence tending to show that the walk had remained in the defective condition already described for three or four months preceding the time of the

injury. Actual notice was not necessary; constructive notice is sufficient." The court there quotes the followiug from Sutton *v.* City of Snohomish, 11 Wash. 24, 39 Pac. 273: "If this dangerous hole * * * was in existence for such a length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances, the law imputes notice. Failure to discover and remedy a dangerous defect in a public street, within a reasonable time, is itself negligence."

Special findings, at the request of the appellant, were made by the jury as follows: "(1) Was there any defect in the sidewalk on Pine street where it is claimed the plaintiff sustained the injuries which caused such injuries? If so, what was the defect? Answer. Yes; a broken board. (1a) Was such defect obvious? Answer. Yes. (1b) How many sidewalk boards were broken, if any, at place of accident? Answer. One. (1c) How many breaks were in the board which tripped plaintiff, if she was tripped, and where were they? Answer. One. Between the outside and middle stringer. (2) If you find there was any defect in the sidewalk where plaintiff was injured, and which caused such injuries, how long had such defect in the walk existed before the happening of the accident to the plaintiff? Answer. One month or more. (4) If you find that the accident to the plaintiff was caused by a broken board in the sidewalk tipping up, state how long prior to the happening of the accident said board was broken. Answer. One month or more."

There was testimony tending to support these special findings. Thus, the question of implied notice was properly submitted to the jury. The instructions contain no reversible error. The verdict of the jury is conclusive, and it is not deemed profitable to review other and minor objections made by appellant. The judgment is affirmed.

GORDON, C. J., and ANDERS, FULLERTON, and DUNBAR, JJ., concur.

MAYOR, ETC., OF WILMINGTON

v.

EWING *et ux.*

(*Supreme Court of Delaware, April 18, 1899.*)

Personal Injuries — Defective Sidewalks — Legislative Power to Change Liability of City by Charter Amendment. — The charter of the defendant city had imposed upon it the duty to keep the sidewalks in repair, and the courts had defined that duty and the liability of the city or its default in the performance of the duty, and, subsequently, the legislature amended the charter so as to exempt the city from such liability, and limited its liability for injuries caused by defective sidewalks to cases where the defects were "caused by the city or any of its authorized agents." The personal injuries for which recovery was sought occurred when such amendment was in force, and resulted from defective gutter plates across a sidewalk, which had been in such condition for over a year; and it did not appear by whom they had been placed. *Held*, that, so far as such case was concerned, the amendment was constitutional and valid.

ERROR by defendant to Newcastle county superior court. *Reversed.*

Argued before NICHOLSON, CH., and SPRUANCE, GRUBB, HENNEWILL, and BOYCE, JJ.

Robert G. Harman and *Horace Greeley Knowles*, for plaintiff in error.

Wm. S. Hilles and *Lilburne Chandler*, for defendants in error.

SPRUANCE, J. This action was brought against the mayor and council of Wilmington to recover damages for injuries sustained by Sidney E. Ewing, one of the plaintiffs, on the 18th of October, 1894, occasioned by defective iron gutter

*See note at end of case.

injury. Actual notice was not necessary; constructive notice is sufficient." The court there quotes the followiug from Sutton *v.* City of Snohomish, 11 Wash. 24, 39 Pac. 273: "If this dangerous hole * * * was in existence for such a length of time that the city authorities, by the exercise of ordinary vigilance, would have discovered it in time to prevent the accident, the city cannot escape liability for want of notice. Under such circumstances, the law imputes notice. Failure to discover and remedy a dangerous defect in a public street, within a reasonable time, is itself negligence."

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SPRUANCE, J. This action was brought against the mayor and council of Wilmington to recover damages for injuries sustained by Sidney E. Ewing, one of the plaintiffs, on the 18th of October, 1894, occasioned by defective iron gutter

*See note at end of case.

plates covering a gutter extending from the adjacent property to the curb, across a certain footway or sidewalk in said city. It does not appear by whom said gutter plates were placed in said sidewalk, but they had been there more than 20 years, and had been broken and out of repair for at least a year before the accident. The action is founded upon the alleged negligence of the city in not keeping the said gutter plates and sidewalk in proper repair, and in suffering them to remain in an unsafe and dangerous condition. By section 31 of the charter of the city, the council was given power "to ascertain and fix the boundaries of streets, * * * to repair and amend the same, and provide for the paving thereof; * * * to regulate and fix the ascent and descent of all streets; * * * to direct the paving of footways and to prescribe the width thereof. * * *" The act of April 20, 1887 (18 Laws Del. 352), created a street and sewer department, and gave to it "entire jurisdiction and control within the limits of said city of the streets, * * * said jurisdiction and control to extend from building line to building line, * * * and the same rights and powers, and * * * the same authority over the said streets * * *," as were theretofore "held and exercised by the council." The city charter further provided, in substance, as follows:

"Sec. 119. That, upon application of certain freeholders residing or holding property on any street, the board of directors of the street and sewer department are authorized, in their discretion, to require the street commissioners to cause the footways of such street to be paved with such material as the case may require, and fix the curbstones agreeably to the ground plan and regulations of the city. Upon the completion of such paving and curbing, the same are to be measured by the chief engineer, and such measurement transmitted by him to said board; and said board is to have the cost and expense of such paving and curbing assessed upon the owners of property bordering or fronting on the street, according to the number of feet in the street line of such property,

and such assessment is to be entered in a record book, and from the time of such entry such assessment is made a lien upon the lands and buildings fronting on such street. The said board is to have a transcript of such recorded assessments transmitted to the city auditor, to be recorded in his office. The said board is forthwith to present to each owner or person having charge of such property a bill for such expense so assessed to such owner; and, in default of payment within 60 days, provision is made for the collection of the same, with costs, by the sale of such property.

"Sec. 120. The owner of any ground may pave his, her or their own front or fronts, provided it be completed within twenty days from the day of fitting the curbstone, and notice thereof given to such owner. * * *

"Sec. 121. The street and sewer department shall have full power and authority to compel the paving and repairing of footways between the curbstone and the building line * * * and to regulate and prescribe the mode of paving or repairing footways and the material to be used therein. * * * The street and sewer department may, however, at its option, pave or repair any footway of the city, and the expense of paving or repairing the same shall be assessed against the premises fronting on said footways, and shall constitute a lien against such premises. The method of assessment and such proceedings as may be had thereon, shall be the same, as far as may be, as now provided by law in regard to paving and curbing footways in section 119 of this act. The owner of any premises fronting upon any footways shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation or obstruction in or upon such footways, or from any defective condition of such footways: provided, however, that such hole, excavation or obstruction or other defective condition of the footways aforesaid is not caused by the city or any of its authorized agents.

"Sec. 122. Upon the completion of any paving or curbing as aforesaid, the chief engineer of the surveying department

shall give to the owner of the property so curbed and paved, a certificate that it has been done according to the proper ground plan and regulation of the city. * * * And no owner of property to whom such certificate is thus given shall be liable for any change or error of regulation, or subsequent curbing or paving of the same property by the street and sewer department in consequence of such change or error, but the same shall be defrayed by the street and sewer department."

All of the above-recited provisions were in force for several years before and at the time of the accident in question, and are believed to be all of the statute law material for the consideration of this case.

The defendant requested the court below to charge the jury that: "If the jury believe that the defective condition of said sidewalk, if said sidewalk was defective, was not caused by the city or any of its authorized agents, then its verdict must be for the defendant." The court refused said request, and charged the jury, in effect, that the charter having imposed upon the city the duty to keep the sidewalks in repair, and the courts having defined that duty, and the liability of the city arising from its default in the performance of such duty, the legislature had no right so to amend the charter as to exempt the city from such liability, and that the act of April 24, 1889 (18 Laws Del. p. 889), being the last clause of section 121 of the amended charter above recited, "is, as far as this case is concerned, unconstitutional and void, and presents no defense to this action." To this charge, and refusal to charge as requested, the defendant excepted; and the assignment of errors covers these and other points in the charge, not necessary now to be stated. The jury rendered a verdict against the defendant, on which judgment was entered.

In the case of Coyle *v.* McIntire, 7 Houst. 44, 30 Atl. 728, the court of errors and appeals settled the law of this state as to the power of the legislature over municipal corporations. It was there held that a municipal corporation is "a body

politic or corporate established by law to assist in the civil government of the state, with delegated authority to regulate and administer the local or internal affairs of a city, town, or district which is incorporated; * * * that such a corporation may be controlled and its constitution altered and amended by the government in such manner as the public interest may require. Such legislative interferences cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it. There is in fact no contract, in any just sense of the word, and public municipal corporations are not founded on contracts. * * * The mayor and council of Wilmington is merely an agency instituted by the state for the purpose of carrying out in detail the objects of government. It is essentially a revocable agency. It has no vested [interest in] any of its powers or franchises. Its charter * * * is in no sense a contract with the state. It is subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, and may change or modify its internal arrangement, or destroy its very existence, at discretion. * * * The legislature can devest the council of any and every power and authority it possesses." In view of this decision, it is difficult to see how the question of the consent of the city to the amendment of April 24, 1889, could have been of any consequence; but if such consent was material, as it certainly was not, it may be fairly inferred from the fact that this amendment is incorporated in the charter as contained in the "Charter, Laws, and Ordinances of the City of Wilmington," published by order of the council in 1893, and from the further fact that this amendment was urged and relied upon by the attorneys of the city as its principal defense to this action.

The sole question necessary now to be considered is whether that part of the said amendment which purports to relieve the city from liability for damages resulting from the defective condition of footways, except such as are caused by the city or any of its authorized agents, is unconstitu-

tional and void. For the purpose of this inquiry, we may presume that the injury in this case was not, in the sense of the statute, caused by the city or any of its authorized agents. Many of the cases cited in the argument were upon the construction of statutes imposing certain duties upon municipal corporations in respect to streets and sidewalks, without expressly declaring the liability or nonliability of the corporation in case of default in the performance of such duties. The liability of a municipal corporation for injuries resulting from defective streets and sidewalks is either an express statutory liability or an implied liability. In general, but not uniformly, it has been held that, where the duty of control over the streets is imposed upon a municipal corporation, there is an implied liability, arising from default in the performance of such duty. Such has been the construction given by the courts of this state to the charter of the city of Wilmington as it existed prior to the amendment of April 24, 1889; but these cases dealt only with the implied liability of the city under a charter which imposed upon it certain duties, and was silent as to its liability. Robinson *v.* City of Wilmington, 8 Houst. 409, 32 Atl. 347; Anderson *v.* Same, 8 Houst. 516, 19 Atl. 509. The charter, as it now is, and was at the time of the alleged injury in this case, is express, as to the circumstances under which the city shall and shall not be liable. "If," as is said in Shear. & R. Neg. § 124, "the statute, either expressly or by necessary intendment, enacts that the corporation shall not be subject to liability, there is the end of the matter."

The power to alter, modify, or take away the liability of municipal corporations for injuries sustained from defective streets and sidewalks has been frequently exercised by state legislatures, and sustained by the courts.

In Watson *v.* Tripp, 11 R. I. 98, it was held that it was the duty of the city to keep its highways in safe condition, and that the city could not devest itself of its capacity to discharge that duty, either by contract or ordinance, unless authorized by statute so to do.

O'Harra *v.* City of Portland, 3 Or. 525, was an action against the city for injuries to the plaintiff occasioned by a defect in a sidewalk which it was the duty of the city to keep in good order. The amended charter of the city provided that "the city of Portland is not liable to any one for an injury to the person growing out of the condition of any streets." It was contended that this provision was unconstitutional and void. The court sustained the constitutionality of the provision, and held that the city was not liable to the plaintiff. Rankin *v.* Buckman, 9 Or. 253, was an action against certain officers of the city of East Portland for injuries resulting from the alleged negligence of the defendants in not repairing a bridge. The charter of the city exempted the city from liability from accidents occasioned by the defective condition of streets, etc., and made the officers liable by whose willful act or gross negligence the accident is caused. The court approved of the decision in O'Harra *v.* City of Portland, exempting the city from liability, and sustained the provisions of the charter making the negligent officers liable. Templeton *v.* Linn Co., 22 Or. 313, 29 Pac. 795, was an action against a county for an injury resulting from a defective highway. Held, that at common law a county was not liable in such case; that, the statute making the county liable in such case having been repealed before the accident, this action could not be maintained. The cases of O'Harra *v.* City of Portland and Rankin *v.* Buckman were approved, and the court say, "If the legislature can constitutionally take away both the common-law and statutory right of action against a municipal corporation for an injury received from a defective highway, it certainly can withdraw the statutory remedy against a county."

In Nichols *v.* City of Minneapolis, 30 Minn. 545, 16 N. W. 410, provisions of the charter of the city, that no action should be maintained against the city on account of injuries from defective condition of any street, sidewalk, etc., unless such action be commenced within 1 year, nor unless notice be given within 30 days, stating the place and time of the

injuries, and the intention to claim damages of the city, were held to be constitutional. In reference to municipal corporations the court say: "Such corporations are creatures of the statute, and have such powers, duties, and obligations as the statute gives or imposes. The legislature is presumed to regulate these as in its opinion the needs and interests of the people within the prescribed territory require. In respect to liability for injuries by reason of defects in streets, the legislature may impose it on the corporation, or not, as it deems most expedient; and it may prescribe the extent to which, or the conditions on which, it shall be liable, and the conditions on which the liability shall be enforced."

In Van Vranken *v.* City of Schenectady, 31 Hun, 516, the provisions of the charter of the city, that the city should not be liable for injuries sustained by defective sidewalks unless actual notice of the defect be given to the council or superintendent of streets 24 hours before the injury, and that claims for injuries should be presented within three months, and actions brought within one year, were held to be constitutional. In McNally *v.* City of Cohoes, 53 Hun, 202, 6 N. Y. Supp. 842, a provision of the city charter, that the city should not be liable in damages for injuries occasioned by a street or sidewalk being out of repair, unless actual notice of the defect be given to the council or superintendent of streets 24 hours before the injury, was held to be valid, and that without such actual notice there could be no recovery. Gray *v.* City of Brooklyn, 50 Barb. 365, was an action against the city of Brooklyn for injuries sustained by reason of a street being out of repair. The charter provided that the city should not be liable in damages for the nonfeasance or misfeasance of the common council, or any officer of the city or appointee of the council, of any duty imposed on them, or any of them, by the statute, but that the remedy should be by *mandamus*, or other proceeding to compel the performance of duty, or action against the members of council or officer. Held, that this statute was a defense to the city. The court says: "I am unable to see

why the legislature may not create a city and limit its liability. The power is constantly exercised." On appeal the decision below was affirmed. 2 Abb. Dec. 267. Fitzpatrick *v.* Slocum, 89 N. Y. 358, was an action, under the above-recited provisions of the charter of the city of Brooklyn, against certain officers of the city, to recover damages for injuries by reason of the negligent operation of a bridge. The court held that the injury was not caused by the act or neglect of the defendant officers; that the said provisions did not exempt the city from liability to discharge a duty resting on it which it has not devolved upon one of its officers. The court say, however, that "the views here expressed are not in conflict with anything decided in the case of Gray *v.* City of Brooklyn. Hardy *v.* Same, 90 N. Y. 435, is to the same effect. In Bieling *v.* Same, 120 N. Y. 108, 24 N. E. 389, the right of the legislature to exempt the city from liability in certain cases specified in the charter, as before set forth, was distinctly recognized. The court say that the city is liable, "except so far as qualified by the statute; * * * that, to relieve itself from such responsibility, it must be made to appear that the cause of the injury complained of * * * is within the provision of the statute exempting the city from liability. That defense was not, by the evidence in the present case, established."

In Parson *v.* City and County of San Francisco, 23 Cal. 463, a statute exempting the city of San Francisco from liability for injuries occasioned by a street being out of repair, and providing that, if the defect has existed for 24 hours, the persons on whom the law may have imposed the obligation to repair, and the officers through whose negligence such defect remained, should be liable to the party injured, was held to be constitutional. In Eustace *v.* Jahns, 38 Cal. 3, while holding that, under the charter of the city of San Francisco, it was the duty of the city to keep the streets in repair, and that it was not the duty of adjacent owners so to do, the court recognized the validity of the provisions of the charter exempting the city from liability for injuries from defective

streets, and transferring such liability to the individual officers and agents of the city whose personal neglect or malfeasance occasioned the injury.

In Hincks *v.* City of Milwaukee, 46 Wis. 559, 1 N. W. 230, it was held that the provisions of the charter exempting the city from liability for injuries occasioned by the condition of the streets or sidewalks, under certain circumstances, were invalid, as granting to the city a special immunity, not enjoyed by other like corporations, contrary to "the principles of constitutional law," and in violation of section 9 of article 1 of the constitution of Wisconsin, that, "every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character." We make no criticism upon this application of the state constitution, but we know of no "principles of constitutional law" which prohibit the legislature from granting to a city special privileges and immunities not enjoyed by all other cities.

The theory of the defense is that, in order to hold valid the provision of the charter exempting the city from liability, it must be shown that there is provided a valid remedy against the owners of the adjacent property. While the maxim "that where there is a wrong there is a remedy" is, in general, true, it is subject to qualifications and exceptions. It is well settled that an action of tort for injuries from defective highways will not lie against a county, in the absence of a statute giving such action. Carter *v.* Wilds, 8 Houst. 14, 31 Atl. 715; Hill *v.* City of Boston, 122 Mass. 344; Templeton *v.* Linn Co., 22 Or. 313, 29 Pac. 795. Nor could such an action against the state be maintained. The legislature had the right to impose on the abutting owner the duty of repairing the footways in front of his property, and, considering all of the above recited provisions of the charter together, it is by no means certain that they have not done so; and, beyond doubt, the amendment of April 24, 1889, purports to make such owner liable for damages resulting from the defective condition of such footways not caused by the city or its agents.

We do not, however, consider it necessary in this case to determine whether the legislature has imposed upon property owners the duty of repairing the adjacent footways, or whether that part of the said amendment which purports to make such owners responsible for damages resulting from the defective condition of such footways is constitutional. It will be time enough to consider these questions when they arise in an action in which they are material. The plaintiffs have no vested right to sue the city in this action. Such liability as is now sought to be enforced never arises from any implied contract between the city and the person injured, but, in the absence of statutory exemption, it is implied by law from the duty imposed by law upon the city. Before the happening of the accident in question, the city was relieved of such implied liability by the express terms of the amendment of April 24, 1889, if such amendment is constitutional. We know of no provision of the constitution of this state or of the United States which this amendment violates. There is great danger in declaring a law unconstitutional because of its supposed conflict with some vague principle of constitutional law. In such cases courts are in danger of substituting their idea of what the law should be for their judgment of what the law is. Caution should be exercised in declaring an act of the legislature unconstitutional, and the presumptions are in favor of its validity. If, after due consideration, a reasonable doubt remains, it should be solved in favor of the act; and it should not be declared unconstitutional unless it be so, clearly and manifestly. Cooley, Const. Lim. pp. 218, 219. The great burden imposed upon municipal corporations by their unrestricted liability for injuries occasioned by defective streets and sidewalks has doubtless been the cause of the frequent modification or removal of such liability. The relief of the city from this unrestricted liability was obviously the main purpose and design of the legislature in enacting this amendment, and this main purpose and design should not be defeated, even if the provision making the adjacent owners liable in certain cases should for any cause

fail to be effective. "If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other." Cooley, Const. Lim. pp. 178–181. From considerations of public policy, as to the sufficiency of which we have no right to determine, the legislature has, by an amendment of the charter of the city of Wilmington, limited the liability of the city to cases of defective condition of footways "caused by the city or any of its authorized agents," and we hold that the said limitation was within the power of the legislature; that the said amendment, so far as this case is concerned, is constitutional and valid; and that the court below erred in its charge to the jury, and in its refusal to charge, as stated above. The judgment below is reversed.

PENNEWILL, J. (dissenting). I regret very much that I cannot agree with the majority of the court in the conclusion they have reached in this case. While I have not considered it necessary to prepare any extended dissenting opinion, or give at much length the reasons which have led me to a different conclusion, I nevertheless deem it proper to briefly state the position I have taken, and wherein I feel bound to differ from the majority of the court.

I am not prepared to say that it is not competent for the legislature to relieve the municipality from liability for injuries caused by defective footways without placing the liability elsewhere; and, while expressing no opinion on that question, yet I think it will be found upon examination that in almost every case, if not in every case, in which a city has been so relieved of such common-law liability, it has been imposed upon certain officers of the city, or other persons whose duty it was to repair such footways. And the provision, found in so many statutes, which exempts the city from liability unless certain notice is given, or claim is made or suit is brought within a certain time, and which has been quite uniformly held to be constitutional, cannot be regarded as sustaining the validity of a statute which relieves the city from liability, because such a provision does not attempt to

take away the remedy for such injuries, but only to regulate its use. This the legislature unquestionably has the right to do. But the statute in question, and which this court is called upon to consider and construe, seeks not only to relieve the city, but also to impose on the owner of the premises fronting upon the footways the liability for all injuries caused by defects in such footways, provided the same are not caused by the city or its authorized agents. It becomes necessary, therefore, to inquire whether the statute is constitutional and valid in so far as it undertakes to impose such liability upon such owner, and, if it be not constitutional and valid in that particular, whether it can be held to be constitutional in so far as it seeks to relieve the city.

I am clearly of the opinion that at the time of the passage of this statute there was no duty resting upon the owner of the premises to repair the footways, but that such duty rested primarily and absolutely upon the city, which had not only the power to make the repairs, but was possessed with complete supervision and control over the footways, and had all the means (by taxation, assessment, and otherwise) to perform such duty. It is true that the owner might make such repairs, but it was discretionary, and not mandatory, and necessarily under the supervision and control of the municipality. Such owner was without the means and power possessed by the city in that behalf. It therefore not being the duty of such owner to repair the footways, it necessarily follows that it was not within the power of the legislature to impose upon him a liability to third persons for injuries caused by the defective condition of such footways; for it is most elementary that such liability cannot be imposed where there is no negligence, and there can be no negligence in this sense when there is no obligation or duty. A statute which seeks to create a liability irrespective of negligence has been quite universally held to be invalid upon constitutional grounds, as well as repugnant to sound reason But it is earnestly contended that, even though the duty to repair did not rest upon the owner prior to the passage of the act which

we are considering, yet it was placed upon him by this act which imposed the liability. It is urged that such duty was created or arose in some way by implication; that is, when the legislature declared by this statute that the owner should be liable, it must have necessarily followed that the same statute raised the duty, because there could not be any liability in the absence of a duty. But such a process of reasoning, I submit, is simply begging the question, and is, in effect, equivalent to saying that there must have been a duty, otherwise the enactment could not be constitutional. And, besides, if the act that imposed the liability also necessarily created the duty, then there would be no meaning in the expression, which is axiomatic, "There can be no liability when there is no duty," because the liability would always carry with it the duty.

Believing that the statute is unconstitutional in so far as it attempts to impose the liability on the owner of the premises, it remains only to inquire whether it can be held to be constitutional in so far as it would exempt the city from liability; assuming that it is competent for the legislature to so exempt the city, and that a statute having that for its sole purpose would be constitutional. Is the statute, in so far as it would relieve the city, so separable from, and independent of, that part which seeks to impose the liability on the owner, that the former can be held to be valid, even though the latter be unconstitutional? In this connection it is needful to keep clearly in mind the very language of the act, which is as follows: "The owner of any premises fronting upon any footways shall be solely responsible for any damage that may result to persons or property by reason of any hole, excavation or obstruction in or upon such footways, or from any defective condition of such footways: provided, however, that such hole, excavation or obstruction or other defective condition of the footways aforesaid is not caused by the city or any of its authorized agents." It will be noted that the city is not expressly exempted, by the terms of the statute, but only by implication, by making the owner solely

responsible. The important question that arises is, did the legislature, at the time of the enactment of the statute in question, intend to relieve the city of liability, if the same could not be placed on the owner? Or did the lawmaking body merely intend to shift the responsibility from the city to the owner? If the latter, then it is inconceivable that it should have intended that the statute, in so far as it exempted the municipality, should be operative, even though the other part should be invalid. It must be remembered that prior to the passage of the statute the city was liable for such injuries as the legislature sought to impose upon the owner, and it was even a common-law liability. I submit that the very effort to impose the liability upon the owner clearly indicates that it was not the intention of the legislature to take away entirely the remedy for such injuries; and it is a fair, nay, an almost irresistible, inference, that the lawmakers would not have taken away the remedy as against the city had they known that their act would leave the party injured absolutely remediless. "The owner of the premises shall be solely responsible." The effect of that language, it is insisted, is to relieve the city which had been hitherto liable. There is nothing else in the act which could possibly give the relief contended for. Then, if that provision ("the owner shall be solely responsible") is held to be invalid, what is there left upon which the city can claim exemption from liability? Cooley, in his work on Constitutional Limitations (pages 211, 212), says: "If, when the unconstitutional part of a statute is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated, within the meaning of the rule." And if the objects sought to be accomplished "are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole,

Note

and if all could not be carried into effect the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." And in a note (page 212 of the same authority) the following language is used: "It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case we know the legislature designed the whole act to have effect, and we should sustain it, if possible. In the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is a general presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void." I do not believe the legislature would have been willing that the act in question, in so far as it, by implication, relieved the city of liability, should be sustained if that part which imposed the liability on the owner were held void. In my opinion, therefore, the act is wholly unconstitutional and void, and accordingly I hold that the former liability of the city for injuries caused by defective footways is not in any wise affected thereby.

NOTE.

Charter Relieving City from Primary Liability for Injury Caused by Defective Street—Constitutionality.—The charter of the city of Milwaukee provides that "whenever any injury shall happen to persons or property in said city of Milwaukee by reason of any defect or incumbrance of any street or sidewalk, alley or public ground, or

from any other cause for which the said city would be liable, and such defect, incumbrance, or other cause of such injury shall arise from or be produced by the wrong, default, or negligence of any person or corporation, such person or corporation so guilty of such wrong, default, or negligence shall be primarily liable for all damages for such injury; and the said city shall not be liable therefor until after all legal remedies shall have been exhausted to collect such damages from such person or corporation." *Held*, that the exemption from liability contained therein, was unconstitutional, as being a grant of special immunity not allowed to other municipalities. State *v.* Bartlett, 35 Wis. 387; Hincks *v.* Milwaukee, 46 Wis. 559; Kimball *v.* Rosendale, 42 Wis. 407; Durkee *v.* Janesville, 28 Wis. 464; Rooney *v.* Milwaukee Co. Sup., 40 Wis. 23; Amos *v.* Fond du Lac, 46 Wis. 695. In O'Harra *v.* City of Portland, 3 Ore. 525, it was held that an act of legislature exempting the city of Portland from liability for an injury to the person growing out of the defective condition of any street or sidewalk was constitutional.

See also Badgley *v.* City of St. Louis (Mo.), *ante*.

RAPID RY. CO.

v.

CITY OF MT. CLEMENS *et al.*

(*Supreme Court of Michigan, Sept. 20, 1898.*)

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APPEAL by complainant from Macomb county circuit court. *Affirmed.*

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APPEAL by complainant from Macomb county circuit court. *Affirmed.*

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*See note at end of case.

Rapid Ry. Co. *v.* City of Mt. Clemens

Byron R. Erskine (*Charles M. Swift*, of counsel), for appellant.

Seth W. Knight (*Elliott G. Stevenson* and *Robert F. Eldredge*, of counsel), for appellees.

Case Stated.

MOORE, J. This is a proceeding in chancery, where complainant seeks to have defendants enjoined from hindering or interfering with the operation of complainant's cars over the Y switch at the intersection of Cass avenue and South Gratiot streets, and the Y on Butler street, in the city of Mt. Clemens. The case was heard in open court. Complainant's bill was dismissed by the circuit judge. From his decision, complainant has appealed.

The complainant for some time has been operating an electric line of street railway from the city of Detroit to Mt. Clemens. It obtained a right of way over the highway occupied by the Detroit & Erin Plank-Road Company from that company. In 1894 an ordinance was granted authorizing complainant to construct a railway track "on, along and through Gratiot street, in this city, from its intersection with the southerly city limits to the southerly line of Cass avenue, and upon such other streets and highways as may be hereafter agreed upon, * * * with all necessary and convenient tracks, turnouts, switches, bridges, and culverts." Section 4 of said ordinance is as follows, *viz.*: "That the authority granted by section 1 hereof shall be construed to be authority only to lay a single track on said street, together with such turnouts, side tracks and switches, as may be necessary for the successful operation of said road: provided, however, that the location of said turnouts, switches and side tracks shall be first approved by the street committee." It will be noticed this franchise gave to the company no rights north of the southerly line of Cass avenue. After the franchise was obtained, the company constructed its road. For a time its cars were operated from both ends. While this was done, the company did not have at Mt. Clemens a Y or turntable upon which it could turn its cars. Later its

cars were equipped to run but one way, and it became desirable to have a Y upon which its cars could be turned. Application was made to the common council for leave to put in a Y at Butler street, which application was granted subject to conditions which will hereafter be stated. The Y was put in, and it was the practice of the company to turn its cars at this place, and back them from there to near the south line of Cass avenue, a distance of about 4,000 feet. At this time the Mt. Clemens & Lake Side Traction Company was operating an electric line of railway on Cass avenue, which passed near the terminal of the complainant. At the intersection of South Gratiot and Cass avenue is one of the most important business centers of the city. Without consulting the common council, the complainant made an agreement with the president and manager of the Traction Company authorizing it to put in a Y at the intersection of South Gratiot street and Cass avenue which would allow it to turn all its cars. The president and manager were not authorized by any vote of the directors or stockholders to make this contract, and, before the Y was put in, they were instructed by the directors not to allow it to be done. The testimony shows this instruction was not communicated to the complainant. It is claimed the mayor and one of the aldermen who was on the street committee had knowledge of the making of this contract. They both testified that, while they knew a connection was to be made between the tracks of the two companies, they did not know it was proposed to put in a Y for the purpose of using it as a turning place for the cars. The Y was put in between midnight Saturday night and midnight Sunday night. On the following Monday night, the common council forbade the use of this Y, and it was not used except to a very limited degree. Later the Traction Company refused to allow it to be used at all. Negotiations were had between the two companies and the city looking to the settlement of the differences between them. These negotiations failed. The common council ordered the

Y on Butler street taken up, as well as the one at the intersection of South Gratiot street and Cass avenue.

It is the claim of complainant that the Y at Butler street is necessary to the management of its road, and that it got some right to put it in by reason of its arrangement with the Detroit & Erin Plank-Road Company. Its application to the common council for leave to put this Y in is hardly consistent with this claim. As the Detroit & Erin Plank-Road Company had no rights whatever in Butler street, it is difficult to see how it could confer any rights upon the complainant. The authority to put in the Y at Butler street was granted with this proviso: "That said grantee, its successors or assigns, shall, if ordered to do so by the common council of the said city, remove said Y switch within sixty days after service upon it of a copy of the order of the common council directing it to do so." The council ordered this Y taken up. The company refused to do what it had agreed to do as one of the conditions of obtaining the right to put in the Y. It now seeks the aid of equity to prevent having done what it agreed to do. If the writ can be used for such a purpose, why may it not be used after the 30-years franchise granted to the company has expired? The Y was accepted with the condition imposed, just as the franchise was accepted with the limitation as to the length of time which it should exist. The railway company is bound by these conditions.

It is claimed, the city having conferred the right to construct the Y on Butler street, it cannot now deprive the company of the use of it; citing Electric Ry. Co. of Grand Rapids *v.* Common Council of Grand Rapids, 84 Mich. 257, 47 N. W. 567. We do not think that case applicable to this one. The city was under no obligation to confer the right to construct a Y on Butler street, and, when it conferred that right, it was competent for it to attach conditions which must be observed. Suppose the franchise to construct and operate the road had been limited to 20 years; could it be claimed the company

Removal of "Y"—Right to Enjoin.

could operate the road after the 20 years had expired, even though the city refused to grant them a franchise to do so? If not, how can it be claimed it can operate this Y when the condition has arisen when the company agreed it should not be operated? The writ of injunction should not be used to aid the complainant in refusing to carry out its agreement. Railway Co. *v.* Snow (Mich.) 71 N. W. 1073.

Right to Construct "Y"—Grant from Connecting Railway.

It is claimed the Y at Cass avenue was convenient and necessary to the operation of the road of the Traction Company; that it was competent for that company to make the contract it did with the complainant, and therefore the Y should be allowed to remain. In our view of the case, it will not be necessary to express any opinion upon the question of whether the president and manager of the company were authorized by the directors and stockholders to make the contract which they made. Whatever rights the Traction Company had to the use of Cass avenue it obtained by mesne conveyances of the rights given by an ordinance to Le Duke and Bishop, and its amendments. The ordinance which conferred the right to Le Duke and Bishop to put in "such turnouts, switches, and side tracks as may be deemed necessary," etc., also provided, in section 6: "The whole length of road authorized by this ordinance shall be deemed one route, and the rate of fare over said road shall not exceed five cents for each person over five years of age." This indicated very clearly that a connection with some other railway was not contemplated when turnouts and switches were referred to, but that the turnouts and switches needed by the railway to whom the franchise was given were intended. This ordinance was amended so as to allow the use of a different kind of rails from those allowed to be used by the original ordinance, and had this proviso: "The manner of laying said tracks and rails and the alignment of the same on the street to be subject to the inspection and approval of the common council and the city engineer." The common council and city engineer had no knowledge of the putting in of this work until after it was done, and never

approved of it. Whatever may be the effect of the contract so far as the two railway companies are concerned,—and upon that question we express no opinion,—the putting in of this Y was unauthorized by the city. The contract made between the Rapid Railway Company and the Traction Company indicated very clearly the purpose of the Rapid Railway Company in making it. It reads: "Whereas the said Rapid Railway Company desires to put in a Y at the intersection of Cass avenue and South Gratiot avenue, in the city of Mt. Clemens, for the purpose of connecting its line with the line of the Traction Company at this point, so that said Rapid Railway Company may turn its cars, now, therefore," etc. The contract also provided: "The said Rapid Railway Company is to have the privilege of using so much of the track of the said Traction Company as may be necessary to Y its cars at this point, not to exceed a distance of 150 feet east and west from the line of said Rapid Railway Company, and to maintain and renew so much of said track as it may use if it becomes necessary during the life of this agreement, including paving and repaving." One cannot read this agreement without coming to the conclusion that the purpose of the Rapid Railway Company in making it was to allow it to turn its cars at this place. The Rapid Railway Company was not authorized by its charter to go north of the southerly line of Cass avenue. This Y was put in to make a turning point for the Rapid Railway Company. It was not authorized by the franchise of the Traction Company. Booth, St. Ry. Law, § 56.

Is it possible that the right to turn cars 47 feet long, and weighing 22 tons, at the intersection of the two principal business streets of a city like Mt. Clemens, can be acquired without obtaining the right to do so from the common council? To state the proposition is to suggest the answer. The common council was not consulted. While the mayor and a member of the street committee had knowledge that it was proposed to connect the two tracks, they both swear they had no knowledge it was proposed to put in a Y at this

point upon which the cars of the railway companies could be turned. And, even if they had knowledge of its purpose, they were not authorized to confer any authority to put it in. This Y was put in between midnight Saturday night and midnight Sunday night. The council at once forbade the use of the Y. and it never has been used except surreptitiously, or by force, or upon one or two occasions by the permission of the council, it being expressly stated that its use did not give the company any permanent rights. It is claimed some rights were obtained by virtue of some action of the common council taken in September, 1896. At this time a contract was entered into between the two companies, giving the Rapid Railway the right to run over the tracks of the Traction Company to the lower part of the city. The contract was not to be binding unless the city granted to the Traction Company an ordinance satisfactory to it, nor unless the franchise rights of the Rapid Railway Company were extended so as to permit it to make a loop around the Avery House Square, and other concessions acceptable to the city and the Rapid Railway Company. Afterwards an ordinance was adopted which conferred certain rights upon the Traction Company. It provided the ordinance should be of no effect unless accepted in writing by the Traction Company, within 30 days from the passage of the ordinance. The time for its acceptance was afterwards extended, but the company declined to accept the ordinance, and never has accepted it. At the same time this ordinance was adopted, one was passed giving certain rights to the Rapid Railway Company. Among other rights conferred was the right to construct the loop around the Avery House Square, conditioned upon its being done within 90 days; the ordinance not to be binding unless accepted in writing within a stated number of days thereafter. The time for the acceptance of this ordinance was extended at the same time the extension was given to the Traction Company, and for the same period. Upon the last day the Rapid Railway Company accepted the ordinance, but it did not build the loop

Note

around the Avery House Square within the 90 days, and it is not yet built. It is evident from the record that when this contract was made and the two ordinances were passed, they were all part of one transaction, and were intended to settle the differences between the two railway companies, and to give the public service to the lower part of the city, and to secure the turning of the cars at the loop provided for in the ordinance. Unfortunately for all the parties, this object was not attained. The contention of the complainant that it is to receive the benefit of this proceeding as though the object of the city, in making it had been attained, when it in fact accomplished nothing, is not tenable. The Traction Company did not accept the ordinance. The condition upon which th contract and the ordinance were to be operative failed, and no rights were acquired by reason of what was done. The decree is affirmed, with costs.

HOOKER, J., did not sit. The other justices concurred.

NOTE.

Failure to Comply with Condition—Injunction.—When a railway company is forbidden by statute to construct and operate its roads upon the streets of any incorporated city without the assent of the corporate authorities, and a right of way is granted on certain conditions to which the company agrees, the authorities will not be enjoined from re-entering and taking possession of the grounds granted to the company when the privilege of re-entering was in case of a default on the part of the company reserved in the contract. Pacific R. Co. *v.* Leavenworth, 1 Dill. (U. S.) 392.

See also City of Cape May *v.* Cape May, D. B. & S. P. R. Co. (N. J. App.), 7 Am. & Eng. R. Cas., N. S., 585, and *note*, p. 590.

CITY COUNCIL OF DAWSON

v.

DAWSON WATERWORKS CO.

(*Supreme Court of Georgia, March 14, 1899.*)

Expenditures — Powers—Water Supply—Validity of Contract.*—Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of water on the credit of the city for a longer period than 1 year; and a contract which by its terms is to run for 20 years, each year's supply to be paid for semiannually from year to year, is operative from year to year, so long as neither party renounces or repudiates it. (a) Cartersville Improvement, Gas & Water Co. *v.* City of Cartersville, 16 S. E. 25, 89 Ga. 683; Cartersville Waterworks Co. *v.* Same, 16 S. E. 70, 89 Ga. 689; Lewis *v.* Lofley, 19 S. E. 57, 92 Ga. 804; Board Com'rs Habersham Co. *v.* Porter Mfg. Co. 30 S. E. 547; 103 Ga. 613,—followed and approved. Spann *v.* Board, 64 Ga. 498; Cabaniss *v.* Hill, 74 Ga. 845,—overruled in part.

Same — Same — Elections.—Is it not absolutely essential to the validity of an election held under that provision of the constitution of this state (article 7) which declares that "no * * * municipality * * * shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of the taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law," that there should be an act of the general assembly prescribing the manner of such election?

Same—Same—Same—Statutory Authority.—The manner of holding such election, where the debt to be incurred is a bonded debt, is prescribed in section 377 *et seq.* of the Political Code.

Same—Same—Same—Same.—There is no general law of this state prescribing the manner of holding elections where the debt proposed to be incurred is not a bonded indebtedness, nor is there any local law expressly authorizing the city council of Dawson to prescribe the method of holding such election.

Same—Same—Same—. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether

*See note at end of case.

City Council of Dawson *v.* Dawson Waterworks Co

a debt other than a bonded indebtedness shall be incurred, an election held pursuant to an ordinance and notice which does not state the amount of the debt to be incurred will not be sufficient to authorize the execution of a contract incurring an indebtedness.

Municipal Contracts*—Ultra Vires—Estoppel.—Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this state, and contrary to its settled public policy, complete performance of such contract on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.

Former Decision.—There is nothing in the decision of this case when it was here before in conflict with the rulings now made.

Benefits Received—Liability of Municipality.—The city council of Dawson has a right to make a contract to supply the city with water for one year, provided there is in the treasury of the city a sum sufficient to pay therefor which may be lawfully appropriated for that purpose, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer space of time is illegal, yet where the other parties to such a contract have complied with their part by erecting a plant at great expense in order to furnish the city with water, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

Conflicting Evidence—Directing Verdict.—The evidence being conflicting as to whether, during the year for which compensation is claimed by the water company for water furnished to the city, the latter received the benefit to be derived under the contract in such a way as to make it liable to pay the annual rental stipulated therein, the case should have been submitted to a jury under proper instructions, and it was error to direct a verdict for the plaintiff.

(Syllabus by the Court.)

ERROR by defendant from Terrell county superior court. *Reversed.*

M. C. Edwards, *J. A. Laing*, and *Guerry & Hall*, for plaintiff in error.

Hall & Wimberly, and *J. G. Parks*, for defendant in error.

COBB, J. The Dawson Waterworks Company brought suit against the city council of Dawson, claiming that the defend-

*See Holder *v.* City of Yonkers (N. Y.), 1 Mun. Corp. Cas. 164 and *note*, p. 167 *et seq.*

ant was indebted to it in the sum of $2,000, besides interest, for water furnished during the year 1895 for the purpose of protecting the inhabitants of the city against fire. At the trial there was introduced in evidence an extract from the minutes of the city council of the proceedings at a meeting held on May 10, 1886, which was as follows: "A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election be run in the Dawson Journal for the time prescribed by law, and that an election be held on said question on the 11th day of June next, 1886." There was also in evidence four issues of the Dawson Journal, the official gazette of the city and county, for the four weeks preceding June 11, 1886, to wit, the issues of May 13th, 20th, and 27th, and June 3d, respectively, showing the election notice, which was as follows: "Election Notice. Notice is hereby given that there will be an election held in the city of Dawson on the 11th day of June, 1886, to determine whether the city of Dawson shall incur the expense of waterworks." It was admitted that at the election held pursuant to this notice more than two-thirds of the qualified voters of the city voted in favor of incurring the expense of waterworks. It was also admitted that the value of the taxable property of the city of Dawson in 1886 and each succeeding year was over $1,000,000.

Case Stated.

The contract relied upon by the plaintiff, which was in the form of an ordinance, appearing in the Book of Ordinances of the City of Dawson, was introduced in evidence. The material parts of this contract are as follows:

Section 231 grants to R. L. Bennett, of Philadelphia, Pa., his associates, their successors and assigns, who are to organize a company to be styled the "Dawson Waterworks Company," the exclusive right and privilege, for a period of 99 years, to construct, maintain, and operate a system of waterworks for supplying said city and its inhabitants, and for protection against fire, and for domestic and sanitary and other purposes.

City Council of Dawson *v.* Dawson Waterworks Co

Section 232 grants authority to lay water pipes and mains in the streets and avenues of said city, as the same are now open or may be extended, and to dig ditches and trenches in the streets.

Section 233 grants the right to erect buildings and tanks, lay pipes, erect other structures, and make improvements on lands owned and controlled by the city, except public squares.

Section 234: The said company, its successors and assigns, is to build and have in operation, in 18 months, a complete and thorough system of waterworks, laying 4.8 miles of pipe, sizes 8, 6, and 4 inches in diameter, with reservoir of not less than 40,000 gallons capacity, and of sufficient height to produce a pressure on the mains such that, from any hydrant located in the principal streets, a stream of water will be projected 50 feet vertically in still air, through 100 feet of fire hose with a 1 inch nozzle attached. Said company, or assigns, from completion of system of waterworks until its charter shall cease, shall be required to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such an event, it shall be allowed a reasonable time to make repairs, and if, after such reasonable time shall have been allowed, it should still fail to furnish said supply of water, its franchise from that fact shall be forfeited.

Section 235: The company is to extend mains and pipes, and enlarge plant of system generally, to meet increasing demands from growth of city.

Section 236: The city of Dawson, in consideration of said company guarantying to it, for the period of 20 years, and as long thereafter as the said company or its successors and assigns shall continue to operate the waterworks, a free and unrestricted use of its water in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains fire plugs of approved pattern, not to exceed 50 in all, until the corporate limits of said city are extended, and the population of said city increases so that there are 500 persons living in said exten-

sion, after which they shall be increased proportionately, if required, and, as an additional fire protection, also to furnish water to fill the present public cisterns, if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company, except in case of fire, obligates itself to pay to the said company, or to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for its bonds, the sum of $2,000 annually for 20 years, in semi-annual payments of $1,000 each, on the 1st days of January and July of each year, the first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and in case said city shall not have sufficient funds at any of such times to make said payments, or for any cause does not pay said money at times fixed as aforesaid, then in that case warrants shall be issued on the city treasurer in favor of the company for the amount due.

Section 237: The council shall, and they are hereby required to, make provision each year for the payment of $2,000, as provided in the foregoing section, by levying a tax sufficient for that purpose upon the taxable property of the city.

Section 238: The company and its successors and assigns is granted the right to make reasonable rates and regulations for the government of private consumers in the use of its water; and to charge such rates for its use as it may from time to time establish: provided, the rates charged per annum shall not exceed those named in the schedule attached, which schedule is immaterial.

Section 239: In consideration of said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of one-inch nozzle each, the city of Dawson obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues, and charges which may at any

time hereafter be levied or assessed by said city against said company, or upon the plant of said system.

Section 240: Full assent of the city is given to a charter to be granted by the legislature of the state to said Bennett and his associates, and their successors or assigns, or to be obtained by them under the general incorporation laws of said state, incorporating them into a body politic, to be known as the "Dawson Waterworks Company," and granting said company the exclusive right to contract, etc., as herein stated.

Section 241 provides that the ordinance shall be mutually binding upon the city of Dawson and R. L. Bennett and associates, and the company to be organized, and to have the same force and effect as a contract between the respective parties as if drawn in the form of a contract and signed by the contracting parties.

Date of ordinance, February 21, 1890.

It was shown that R. L. Bennett and his associates were, subsequent to the execution of the contract, incorporated under the name of the Dawson Waterworks Company. It was admitted that the only fire which occurred in the city during the year 1895 occurred on the 19th of February. There was evidence that the city authorities had accepted the works which were built by the Dawson Waterworks Company, and that the same cost about $40,000; that during the year 1895 the waterworks company had maintained the system in conformity to the contract, and were ready at all times to supply the quantity of water and the pressure required by the contract. It also appeared that, at the fire above referred to, water from the hydrants of the waterworks company was used in extinguishing the fire, and that the mayor and other city officials were present at the fire, and assisted in extinguishing the same with the water drawn from the system of the waterworks company. It was shown that in December, 1894, the city authorities passed a resolution declaring their intention to abandon the contract, and that notice of such intention was given to the company.

There was also evidence offered from which it might be inferred that during the year 1895 the city maintained a fire department as it had existed in former years, and that it was the duty of the officers and members of such department to attend all fires, and use appliances placed in their hands by the city to extinguish the same; that, without the water furnished by the waterworks company, such fire department would be useless. There was, however, evidence that some of the officers of the city understood that they had no authority to use, during the year 1895, the water furnished by the waterworks company to extinguish fires. Different members of the fire companies recognized by the city were called as witnesses, some testifying to the effect that they had never received any information as to a change in their status towards the city, or in their duties in reference to fires which might occur during the year in question, and their right to use the water of the waterworks company. It was contended by the defendants that the efforts of the city officials to extinguish the fire on the occasion above referred to were purely voluntary, and not in any way intended by them as a recognition of an existing contract between the city and the waterworks company. The court directed the jury to return a verdict in favor of the plaintiff for the amount sued for, with interest, and the defendants excepted.

1. The present constitution of the state provides (article 7, § 7, par. 1): "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which

Expenditures—Powers—Water Supply—Validity of Contract.

of war, and to pay the public debt existing at the time of the adoption of the constitution. The state cannot pledge its credit to any person or corporation, and is not allowed to become a joint owner or stockholder in any company, association, or corporation. The bonded debt of the state can never be increased, except to repel invasion, suppress insurrection, and defend the state in time of war. It is expressly declared that, when any public property of the state is sold, the proceeds of the sale shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatsoever, so long as the state has any bonded debt. Provision is made for a sinking fund to pay off and retire the bonds of the state which had not matured when the constitution was adopted. In addition to the clause above quoted in reference to incurring new debts by municipal corporations, the following provisions are to be looked to in determining the question now under consideration: "Any county, municipal corporation, or political division of this state, which shall incur any bonded indebtedness under the provisions of this constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Civ. Code, § 5894. "Municipal corporations shall not incur any debt until provision therefore shall have been made by the municipal government." *Id.* § 5897. We are to determine what was the intention of the framers of the constitution, as well as what was the scheme of government they sought to put into operation, so far as it relates to the power of the public authorities to incur debts in behalf of the public. This must be derived from the various provisions of the instrument itself, read in the light of antecedent and concurrent public history. All of these provisions which are material to the question now under consideration have either been quoted or referred to in such a way as that their import can be clearly ascertained. It is not only proper, but

it is our duty, to consider any and all facts and circumstances, connected with the public affairs of the state, which will throw any light upon the question of the intention of the framers of the constitution in reference to the matter now under consideration. It is a matter of public history that, at the time that this constitution was framed by the convention and adopted by the people, there was an outstanding public debt which the state had contracted for various purposes. There were towns and cities in the state burdened with debts which had been contracted by the public authorities of these corporations, and the manifest tendency was rather to the increase of this class of public burdens than otherwise. There were political divisions in the state where the people were so burdened by debts created by the public authorities that it was clearly apparent that, unless some check was placed upon the power of the governing authorities to incur debts, the rates of taxation which would be required in the future to meet the debts would be ruinous. It was also a matter of public history, and it appears in the constitution itself, that, a few years before the constitution was adopted, there had been an attempt to impose upon the state a debt which had never been legally authorized, and that the state had, in the exercise of its sovereign authority, declared that such debt was never owed by the public, and by an amendment to the then existing constitution the general assembly was prohibited from paying the same, or any part thereof.

Taking into review, as the framers of the constitution did, the condition of the public debt of the state, and the condition of the public debt of the various subordinate political divisions of the state, nothing can be plainer than that the power to create debt, incur liabilities, and impose burdens to be discharged in the future was liable to be grossly abused, if the same existed without restrictions, either in the hands of the general assembly or the authorities of the subordinate public corporations of the state. In the light of all these facts, what is meant by the various provisions of the con-

of war, and to pay the public debt existing at the time of the adoption of the constitution. The state cannot pledge its credit to any person or corporation, and is not allowed to become a joint owner or stockholder in any company, association, or corporation. The bonded debt of the state can never be increased, except to repel invasion, suppress insurrection, and defend the state in time of war. It is expressly declared that, when any public property of the state is sold, the proceeds of the sale shall be applied to the payment of the bonded debt of the state, and shall not be used for any other purpose whatsoever, so long as the state has any bonded debt. Provision is made for a sinking fund to pay off and retire the bonds of the state which had not matured when the constitution was adopted. In addition to the clause above quoted in reference to incurring new debts by municipal corporations, the following provisions are to be looked to in determining the question now under consideration: "Any county, municipal corporation, or political division of this state, which shall incur any bonded indebtedness under the provisions of this constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Civ. Code, § 5894. "Municipal corporations shall not incur any debt until provision therefore shall have been made by the municipal government." *Id.* § 5897. We are to determine what was the intention of the framers of the constitution, as well as what was the scheme of government they sought to put into operation, so far as it relates to the power of the public authorities to incur debts in behalf of the public. This must be derived from the various provisions of the instrument itself, read in the light of antecedent and concurrent public history. All of these provisions which are material to the question now under consideration have either been quoted or referred to in such a way as that their import can be clearly ascertained. It is not only proper, but

it is our duty, to consider any and all facts and circumstances, connected with the public affairs of the state, which will throw any light upon the question of the intention of the framers of the constitution in reference to the matter now under consideration. It is a matter of public history that, at the time that this constitution was framed by the convention and adopted by the people, there was an outstanding public debt which the state had contracted for various purposes. There were towns and cities in the state burdened with debts which had been contracted by the public authorities of these corporations, and the manifest tendency was rather to the increase of this class of public burdens than otherwise. There were political divisions in the state where the people were so burdened by debts created by the public authorities that it was clearly apparent that, unless some check was placed upon the power of the governing authorities to incur debts, the rates of taxation which would be required in the future to meet the debts would be ruinous. It was also a matter of public history, and it appears in the constitution itself, that, a few years before the constitution was adopted, there had been an attempt to impose upon the state a debt which had never been legally authorized, and that the state had, in the exercise of its sovereign authority, declared that such debt was never owed by the public, and by an amendment to the then existing constitution the general assembly was prohibited from paying the same, or any part thereof.

Taking into review, as the framers of the constitution did, the condition of the public debt of the state, and the condition of the public debt of the various subordinate political divisions of the state, nothing can be plainer than that the power to create debt, incur liabilities, and impose burdens to be discharged in the future was liable to be grossly abused, if the same existed without restrictions, either in the hands of the general assembly or the authorities of the subordinate public corporations of the state. In the light of all these facts, what is meant by the various provisions of the con-

stitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the state itself? Nothing can be clearer. The public debt of the state must not be increased for any purpose, except those few above mentioned. No new bonds shall ever be issued, except for these purposes, or to take the place of existing bonds that have matured; and the railroads and other property owned by the state, whenever it was deemed best to sell any part of the same, must be used to reduce this bonded debt,—the proceeds of the sale, whenever there was a sale, being required to be paid upon the public debt. It is true that the state had plenary power to tax in order to pay the debt, but it is obvious that it was the intention of the makers of the constitution that the taxing power should be so used that this burden should be at some time in the future finally discharged. The state was not to be a perpetual interest paying debtor. The provision relating to the proceeds of the sale of public property and those creating the sinking fund demonstrated that it was intended that there should be a time when the state would be free from debt. Not only was it the intention of the framers of this instrument that this debt should be paid, but it was equally their intention that no new debt should be incurred by the state, except for the purposes heretofore referred to. In brief, the state was in debt, and the constitution recognized this fact. The rule laid down for the future was: Pay the debt, and incur no new obligation. The state must not, in the future, engage in any work of internal improvement, except those of a purely governmental nature. The various departments of government must be supported from year to year by taxation, and only in two instances is the state authorized to incur a debt,—the one, when it may be necessary to defend itself when attacked either by a foreign enemy from without or a domestic enemy from within; and the other, in case it was necessary to make a loan to supply a casual deficiency in the treasury, and the amount of such loan is expressly limited. It was not contemplated that it would

ever be necessary for the state to incur any debt, except for these purposes, and therefore the power to create the debt was distinctly taken away by the constitution. In the case of the subordinate public corporations of the state, it was seen that in the future, as these corporations grew in population, it might be best to permit them to incur debts in some instances, rather than to impose upon the people resident therein a heavy burden of taxation for any one year. There are many things which are needed by municipal corporations which the state would never need, and therefore the fact that it would be wisest sometimes for municipal corporations to supply themselves with these needed things by borrowing money was recognized by the framers of the constitution, and they did not entirely deprive these subordinate public corporations of the power to incur debts, but simply prescribed that the debt should be incurred in a given way, after the consent of the people had been obtained, and that, when incurred, it should not exceed a certain percentage upon the assessed value of the taxable property embraced within its limits.

The power of a municipality to incur a debt is hedged around with such safeguards that it is not probable that the conditions imposed can be complied with unless it is manifest that the purpose for which the debt is to be incurred is a proper one, and that the amount of the debt is such that the tax required to discharge it would not be unreasonable and burdensome. While these corporations were not deprived entirely of the power to incur debts, as is the state, the same controlling idea in reference to indebtedness by the state is apparent in regard to indebtedness by these subordinate corporations; that is, that there is to be no plan by which a debt is to be perpetually carried by counties and cities. Municipal corporations cannot incur a debt until they provide for paying the same, and they cannot incur a bonded debt unless, "at or before the time of so doing," provision is made "for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said

the court held was that, if the amount stipulated to be paid annually was paid during the year in which the service for which the municipal corporation contracted was performed, no indebtedness was incurred by the town. JUSTICE BLANDFORD, in the opinion in that case, says: "Whether this contract incurs an indebtedness which is required to be submitted to the voters of the town under the constitution it is not necessary for us now to decide. It may be that the question may never arise, even under this contract, if the sum stipulated to be paid annually for the supply of lights is paid as it becomes due; and if this is a reasonable expense to be incurred by the city, and we do not see why it is not, then the question will never arise. Should the city make default of payment, then the question might arise, and it would have to be decided whether this was such a contract as imposed upon the city an indebtedness such as is contemplated by the constitution to be submitted to the people. 'Sufficient unto the day is the evil thereof.' Let the light shine in Waycross." That case cannot be used as an authority to uphold as valid the contract under consideration in the present case, except to the extent that, if the waterworks company in any year complies with its contract, and furnishes water, and the city uses the water, and thus receives the benefit of the contract, it can, and ought to, pay for the service out of the taxes levied during the year in which the water was used. The only effect of the ruling in that case was that no "debt," within the meaning of that term as it is used in the constitution, is incurred by a municipal corporation for a current expense of this character, if the liability growing out of the transaction can be discharged by the payment of money raised by taxation during the current year.

The word "debt" is defined in various ways. According to the Standard Dictionary, it is "that which one owes to another; any money, goods, or service that one is bound to pay to another; a pecuniary due." "A thing owed; obligation; liability." Webst. Dict. "A liquidated demand; a sum of money due by certain and express agreement." And,

Law Dict.; 3 Bl. Comm. 154." All that is due a man under any form of obligation or promise." Bouvier. From the foregoing definitions it is apparent that the word, when taken in a broad and comprehensive sense, includes any obligation to pay money, or other thing of value, that one is under to another, and arises the very moment that the obligation is undertaken, and continues until discharged by payment. Therefore, in this broad and comprehensive sense, if any time elapses between the performance of the service on the one hand, and the payment of the money or thing of value which the contract for that service calls for on the other, the relation of the parties to each other will be that of debtor and creditor, and the thing which is owed by one to the other will be a debt. If the word "debt" is to be given this meaning in the clause of the constitution now under consideration, then no officer of any public corporation is authorized to purchase for the public any article, no matter how small and trifling, unless payment for the same is made in cash at the time the article is delivered, and no article of necessity in the administration of the various public offices in counties and cities in this state can be ordered to be paid for at any time in the future, no matter how short the time may be between the order for the goods and the delivery of the same. Was it the intention of the framers of the constitution that this strict construction should be given to the words that they have used? It is a matter of public history that, from the very organization of the first subordinate public corporation in this state, the sums necessary to pay the expenses incident to the administration of public business was raised by taxation levied from year to year upon the person and property of the inhabitants. Public burdens of every nature were divided into annual sums, and were discharged by annual taxes collected for the purpose. Almost without exception, this was, and has been, the rule, not only in regard to the subordinate public corporations of the state, but in regard to the state itself. As a general rule, public officers are compensated

by sums which are paid annually; in other words, it is now, and has always been, the rule that salaries and all expenses of government are paid by the year, out of taxes raised during the year in which the service to be compensated was rendered. The constitution was framed and adopted in the light of this fact, and it is not to be presumed that it was intended, by the use of the word "debt," that an interpretation should be placed upon it which would have the effect of entirely revolutionizing the practice of nearly a century in relation to the way in which public expenses were incurred and discharged. Especially would this meaning not be given to the word when the constitution itself, in one of the clauses above quoted, not only expressly recognizes that this is the method of dealing with matters of public expense and public debt, but directly declares that that shall be the rule to be followed as to one class of debts which it authorizes municipal corporations to incur. "Debt," therefore, as used in the constitution, is to be understood as a liability which is undertaken, and which must be discharged at some time in the future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken. The purpose of the framers of the constitution was to prevent an accumulation of liabilities upon municipal corporations, which could be enforced against such corporations in the future by the compulsory levy of taxes.

The policy of the constitution is not only against the incurring of liabilities to be discharged in the future, for services rendered concurrently with the liability incurred or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performance of some service to be rendered in the future. If the character of the undertaking is such that he who deals with a municipal corporation can, under the contract, in the future, of his own volition, and without the consent and over the protest of the authorities of the municipality, place upon it a liability which must be discharged by the levy of a tax in the future,

such an undertaking creates a debt within the meaning of the constitution of this state, and one of the very classes of debts which the constitutional provision was made to guard against. If the authorities of a municipal corporation of this state are to be allowed to anticipate far into the future the needs and expenses during each year, and to fix in advance an amount that shall be paid for current expenses, and make a contract under which the other contracting party has a right from year to year, by a simple performance, to put himself in a position where he can demand of the authorities a discharge of the obligation, then it seems to us that the framers of the constitution have done only a vain and idle thing in placing in the fundamental law of the land the clause now under consideration. Apart from the policy of allowing the authorities of municipal corporations to anticipate what should be incurred as a current expense 10, 15, or 20 years in the future, we cannot bring our minds to the conclusion that such an undertaking was ever intended to be authorized by the framers of the constitution. Nay, more; we are convinced that just such undertakings, the consequences of which are just as disastrous as those obligations under which a present liability is incurred, were in contemplation by the framers of the constitution, and intended to be prohibited by this provision.

Taking into consideration all of the provisions of the constitution which deal with this subject of debts to be incurred by the public, and taking into consideration the matters of public history above referred to, we are brought to these conclusions as to what was the intention of the framers of the constitution in the matter of debts to be incurred by municipal corporations: (1) The word "debt" is not to be construed in its broad and unrestricted sense of a liability by one person to pay money or other thing of value to another. (2) A liability for a current expense can be incurred by a municipal corporation for any one year, provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the city which might lawfully be appropriated to

the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and such a transaction would not create a "debt," within the meaning of that word as it is used in the constitution. (3) It was the purpose of the constitution to provide a system of finance for subordinate public corporations under which there should be, each year, contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year; that is, each year's expense should be paid by taxes levied during the year, and no item of expense was to be paid, except out of the taxes levied during the year in which the contract for such expense was made. (4) Any liability which was not to be discharged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a "debt," within the meaning of the constitution, and cannot be incurred without the preliminary sanction of a popular vote, unless it be for a temporary loan to supply casual deficiencies of revenue. If we are correct in these conclusions, then the contract under consideration in the present case created a "debt," within the meaning of the constitution, the aggregate amount of which was the sum of the annual rentals therein stipulated to be paid; and it is therefore illegal, and not binding except for the first year in which the contract was entered into, and for any subsequent years in which the municipality sees proper to receive at the hands of the waterworks company the benefit which the company might derive from the contract.

Counsel for defendant in error earnestly insisted that, as it was determined by the supreme court of the United States, in the case of City of Walla Walla *v.* Walla Walla Water Co., 19 Sup. Ct. 77, that contracts of this character did not create debts, and that this decision was so well supported by reason as well as by the current of American authority, we should follow the same, although it was upon a question on which the decisions of that court are not binding upon this court. Not-

withstanding the great respect we have for the decisions of that court, we are constrained to disagree with it in the conclusions reached in the case referred to. We cannot, without doing violence to what we believe to be the manifest intention of the framers of the constitution, follow the rulings made by that court and other courts of respectable standing throughout the Union. That the ruling which we make in the present case is in direct conflict with a decision of the highest court in the land, as well as with the current of American authority on the subject, is the best evidence that can be offered to show how strong our convictions must be as to what was intended by the framers of the constitution, as we gather it from the instrument itself and the matters of public history of this state which are alluded to above. In the case above referred to the court had under consideration a contract very similar to the one involved in the present case, made by the city of Walla Walla with a water company. The charter of the city provided that "the limit of the indebtedness of the city of Walla Walla is hereby fixed at $50,000. The court comes to the conclusion that the aggregate amount to become due under the contract was not to be added to the existing indebtedness of the city in determining whether the charter limit of indebtedness had been reached, and that there was no indebtedness under the contract until the services therein provided for had been actually rendered. MR. JUSTICE BROWN, in the opinion, says: "There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposes to purchase outright, or establish a system of waterworks of its own, the section would apply, though bonds were issued therefor, made payable in the future [citing authorities]. There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. * * * But we think the weight of authority, as well as of reason,

favors the more liberal construction that a municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such a debt be payable in the future by installments. In the one case, the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment being only postponed. In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. * * * A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company, which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals [citing authorities]. The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to the debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employees, to whom the city necessarily

becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers, they are at liberty to make contracts, regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires and purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor." The learned justice, in the opinion, cites the case of Lott *v.* City of Waycross, *supra*, as one of the authorities to sustain his position. He has entirely misconceived the scope of this decision. The question dealt with by him is expressly left open and undecided.

Upon two propositions we are compelled to take issue with the learned justice who delivered the opinion: First, we cannot agree that there is such a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise, as that a municipal corporation may make a contract of the latter character, when it is expressly prohibited from creating a debt. In the consequences resulting, in the effect upon the taxpayers, and in every way that either may be productive of harm, the two are identical. In each a liability is incurred, and the party contracting with the city, no matter what we may call him,—creditor, or contracting party in an agreement for future indebtedness,—has, by the simple performance on his part of some act provided for in the agreement, the right to use the strong arm of the law to compel the city to pay him therefor. A city thus situated is under an obligation that it cannot throw off; has upon it the weight of a burden that it is bound to carry; is powerless to defeat, if it is desired to do so, the claim of him with whom it has contracted; is in debt, and no argument founded upon sound reason can ever make it otherwise. Second, we cannot agree that the obvious purpose of limitations of this character is to prevent the improvident con-

tracting of debts for other than the ordinary current expenses of the municipality. It seems to us clear, from what we have stated, that the almost expressly avowed purpose of the framers of the constitution, was not only to prevent the improvident contracting of debts for other than the ordinary current expenses, but also to prevent the improvident contracting of debts for all purposes, whether for current expenses or otherwise, except by the sanction of a popular vote, unless for some reason there should be during the year a deficiency in the revenue raised for the purpose of paying the current expenses of the municipality. If contracts of the kind now under consideration are to be allowed, on the ground that they are for current expenses, then it would seem that there was no reason for that provision in the section which authorizes a temporary loan to supply a casual deficiency. The power to make a temporary loan for a casual deficiency, being expressly conferred, but emphasizes the fact that the constitutional plan was that there should be a balancing of accounts at stated periods of time, at the end of the calendar year or the fiscal year of the corporation, when the amounts raised by taxation, on the one hand, should be applied to the sums incurred as expenses, on the other; and if, during the period in which the expense was incurred and the tax was levied, by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency, casual in its nature, which was contemplated by the constitution arose, and could be supplied by a temporary loan. The period, marked by the calendar year or an arbitrary fiscal year, was evidently in contemplation by the framers of the constitution, as that is in accord with the custom so long existing in this state.

The conclusion reached by the supreme court of the United States in the Walla Walla Case seems to be sustained by the decisions in the following cases: Grant *v.* City of Davenport, 36 Iowa, 396; Budd *v.* Budd, 59 Fed. 735; City of Valparaiso *v.* Gardner (Ind.) 49 Am. Rep. 416; Raton Waterworks Co. *v.* Town of Raton (N. M.) 49 Pac. 898; Creston Waterworks

Co. *v.* City of Creston (Iowa) 70 N. W. 739; Wade *v.* Borough of Oakmont (Pa. Sup.) 30 Atl. 959; Utica Waterworks Co. *v.* City of Utica, 31 Hun, 426; Woods *v.* City of Oklahoma, 2 Okl. 158, 37 Pac. 1094; Dively *v.* City of Cedar Falls, 27 Iowa, 227; Dwyer *v.* City of Brenham, 65 Tex. 526; Lamar Water & Electric Light Co. *v.* City of Lamar, 128 Mo. 188, 26 S. W. 1025, and 31 S. W. 756; Weston *v.* City of Syracuse, 17 N. Y. 110; Stedman *v.* City of Berlin (Wis.) 73 N. W. 57; New Orleans Gaslight Co. *v.* City of New Orleans (La.) 7 South. 559; City of East St. Louis *v.* East St. Louis Gaslight & Coke Co., 98 Ill. 415; McBean *v.* City of Fresno, 112 Cal. 159, 44 Pac. 358; Smith *v.* Dedham, 144 Mass. 177, 10 N. E. 782; Seitzinger *v.* Borough of Tamaqua (Pa. Sup.) 41 Atl. 454. In the following cases the conclusion reached seems to sustain the ruling made in the present case: Appeal of City of Erie, 91 Pa. St. 398; Humphreys *v.* City of Bayonne (N. J. Sup.) 26 Atl. 81; Niles Waterworks *v.* City of Niles (Mich.) 26 N. W. 525; Salem Water Co. *v.* City of Salem, 5 Or. 29. In none of the cases was the constitutional or charter provision, in which the word "debt" was used, exactly identical with the words of our constitution; but in some of them there is no material difference, and this is true of a greater number of the cases cited on each side of the question. Believing that no other conclusion would carry into effect the constitution as its framers intended, we have nothing to do with the argument that the result reached by us may be disastrous to municipal corporations desiring to make public improvements. We do not believe, however, that the consequences will ever be so disastrous as seems to be anticipated by counsel in the present case, or by justices in decisions in cases where a contrary view to that expressed by us is taken. So far as we are concerned, we are satisfied with the policy of the constitution, which, as we believe, demands annual adjustments of municipal expenses and municipal taxes, with the requirement that the expenses each year shall be

discharged by the taxes of that year, save only in the two cases provided for in the constitution,—consent of the inhabitants of the municipality, and a casual deficiency in the revenue. All of the cases heretofore decided by this court, in which the matter now under consideration was directly dealt with, will now be considered in the light of what we have said, and attention will be directed to the effect of the ruling made in the present case, whatever it may be, upon each of the rulings heretofore made by this court.

The first case on this question that came before this court after the adoption of the constitution of 1877 seems to have been Hudson *v.* City of Marietta, 64 Ga. 286. Only two justices participated in this decision, and therefore, if it is in conflict with the views now entertained by us, it need not be formally overruled. All that is in this case that bears at all upon the question now under consideration is the language of CHIEF JUSTICE JACKSON, quoted in another part of this opinion, as to the intention of the framers of the constitution; and his views, therein expressed, seem to be entirely in accord with those now entertained by us.

In Spann *v.* Board, 64 Ga. 498, it was held that under the constitution of 1877 a county could not levy a tax "to buy a safe without the assent of two-thirds of the voters at an election held for that purpose." JUSTICE JACKSON, in the opinion, says: "The levy of twenty-two per centum for iron safes is not mentioned in the purposes enumerated in the second paragraph of the sixth section of the seventh article; nor are there words therein which, without much latitude of construction, can be construed to authorize the tax. Besides, the purchase of these safes is the creation of a new debt since the adoption of the constitution of 1877, and expressly prohibited by the first paragraph of the seventh section of article 7, 'without the assent of two-thirds of the qualified voters of the county at an election for that purpose, to be held as may be prescribed by law.' No such election has been held, and a new debt, without its sanction as a condition precedent, cannot be imposed. * * * It was the purpose

of the framers of that constitution to tap the root of that system of indebtedness, by counties, cities, and towns, which was growing into immense proportions, and spreading mildew and blight everywhere over the land; and it is made our duty by the same constitution to declare all laws in violation of its provisions and prohibitions to be null and void. * * * These safes might have been bought on a credit, and a debt incurred therefor, prior to this constitution (Code, §§ 497–502); and they may be bought still, if the county should have surplus funds from any source to pay cash for them (*Id.* § 528), or if the debt be incurred with the assent of two-thirds of the voters of the county, but not otherwise." So far as that case may be authority for the position that a contract for the purchase of articles of the nature therein dealt with will not be lawful, notwithstanding there has been, or may be, during the current year in which the contract of purchase is made, a tax levied which will realize a sufficient amount which can be lawfully appropriated to discharge the obligation, the same is overruled, as being in conflict with the views hereinbefore presented.

In Mayor, etc., *v.* McWilliams, 67 Ga. 106, it was held by two justices that, "where a tax has been levied by a municipal corporation sufficient to cover an anticipated expenditure for city offices or the like, it is not necessary to delay taking any steps towards securing such improvements until the money is actually in the treasury. To have work done, and pay for it at its completion, or by installments during its progress, having the money ready when the time of payment arrives, is not to incur a 'debt,' within the meaning of the constitutional prohibition on that subject." In the opinion JUSTICE SPEER uses this language: "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future does not constitute or ripen into an indebtedness, within the meaning of the constitution, till at least the performance of the work. * * * If this were not so, then it would be impossible, in a majority of instances, to even

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contract for the most necessary public building without a prior levy and deposit of money in the treasury. The obligation to pay, so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness, within the meaning of the constitution, is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so, if I pay him as he progresses, I will not be his debtor; so, if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if, on its fulfillment, I discharge it, I cannot be said to have incurred a 'debt,' in the sense the constitution prohibits corporations from incurring." CHIEF JUSTICE JACKSON, in a concurring opinion, distinguishes this case from Hudson *v.* City of Marietta and Spann *v.* Board, *supra*; and in reference to the latter case he uses this language: "It is true that in the county case, in delivering the opinion, I do also invoke the other clause of the constitution, and use expressions going to show that something like this,—iron safes,—to be paid for by taxes, is a 'debt,' in the sense of the constitution; but I say there that, if the county had money legitimately drawn from other sources, it could pay for the safe. In this case this money will be in the treasury, legitimately put there by taxation for current and ordinary expenses,—the prime necessity of a municipal government, a city hall and appurtenances; and I think that the constitutional prohibition against new debts does not cover such a case." JUSTICE CRAWFORD, in his dissenting opinion, after referring to the constitutional provision under consideration, says: "It is admitted that a new debt could not be incurred, except as above provided. Then the question is whether a city can levy a tax with which to pay a future liability that it could not legally incur. If the right exists to make the contract, the time when the payment is to be made is wholly immaterial. It neither enlarges the power, nor changes the nature of the liability. It is the incurring of a new debt, whether paid when the work is done, or five years thereafter. It is a

debt from the making of the bargain until paid, be that when it may. To say that for a new debt to be incurred with which to build a town hall without first submitting it to the people would be unconstitutional, and to say that the levy of a tax to build a town hall without submitting that to the people would be constitutional, does not seem to me to be either law or logic. This provision in the constitution was to give the taxpayers the right to say whether the expenditure should be made, and to require their assent before the taxes should be laid for such expenditure." Some of the language of JUSTICE SPEER is in direct conflict with the views now entertained by us, and we decline to follow his reasoning. Taking the case in the light of the concurring opinion of the chief justice, the judgment in that case does not conflict with the ruling now made. The views entertained by the dissenting justice go much further in the line of strict construction than we are ourselves prepared to go.

While no ruling was made directly on the question now before us in Walsh *v.* City of Augusta, 67 Ga. 293, the clause of the constitution with which we are now dealing was under consideration, and it may not be inappropriate to quote here some of the language of CHIEF JUSTICE JACKSON, where he calls attention to the evil which was intended to be remedied by the clause of the constitution now under consideration. After referring to the law in relation to such matters as it existed before the adoption of the constitution, he says: "What was the evil? It was the evil attendant upon all people who handle money not their own. The cities of the state incurred a very heavy indebtedness. Some of them became insolvent. To levy taxes enough to pay them would work the ruin of the citizens and blight the prospects of the city. Not to levy and pay them would be to destroy credit and soil honor. The cities are the arteries of the body politic. With them destroyed or sluggish, the heart, the very life of the republic, would cease to beat, or pulsate with a feeble supply of vital fluid. So that in their health is involved that of the entire commonwealth, and to suffer their honor to be

tarnished is to soil that of the state. Therefore the strong language used by this court in 64 Ga. 286, 498, in respect to the evils resulting from this unlimited power to incur city indebtedness with only the slight check of the sanction of a majority of the voters, without regard to their property or intelligence, is sober, though figurative. It is stern truth, and no flight of fancy. One of the largest cities of a sister state actually surrendered her franchises and ceased to be corporate because of the extravagant debts her authorities had incurred and her total inability to meet them, and one of our own was almost in the throes of death because of the burden under which she staggered. To stop this tide of evil, which always swells in the calm of prosperity and peace, rather than in the storm of adverse weather, when all eyes are watching the danger, the framers of the constitution of 1877 inserted this paragraph and the succeeding paragraph of this section; and, reading them in the light of the old constitution, the mischief, and the remedy, we think the meaning will become apparent, despite the confusion which arises from the inaccurate use of the words. The framers of it could not extinguish past indebtedness of cities. The constitution of the United States prohibited their doing so, because the obligation of contracts would be destroyed. But they did everything else which they had power to do to stay this tide, and keep Georgia above its flood. They prohibited all cities from making any new debt, unless sanctioned by two-thirds, instead of a majority, of the voters, except small loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum upon the taxable property thereof. They then, even with this sanction of two-thirds of the citizens to a new debt, required a provision for the payment of this debt by the assessment and collection of an annual tax sufficient to pay the principal and interest of the debt within 30 years. * * * Thus determined to preserve the honor and credit of the state by preserving that of her minor governments, the framers of the constitution of 1877 inserted these checks on new debts of

cities: First, two-thirds must vote them; and, secondly, preparation must be made by taxation to pay them, and the voter, when he deposits his ballot, must know that he puts no burden on posterity which he will not assume himself, but every year he must pay his *quota* for interest and a sinking fund for principal, to be levied and collected on his property."

In Pennington *v.* Gammon, 67 Ga. 456, it was held that a county may organize a chain gang, to be composed of convicts, to work on the public roads, streets, or other public works, and that provision may be made for their safe-keeping and employment, and that if, when engaged in a work of this character, there should arise a necessity to purchase tools and implements necessary for the work, the county could, when too late to levy a tax for this purpose, incur a debt,—this being a "casual deficiency in the revenue," within the meaning of that expression as it is used in the constitution. The amount of such debt, however, is not to exceed the limit fixed by the constitution; that is, one-fifth of 1 per centum upon the assessed value of the taxable property of the county. There is nothing in this decision which conflicts with what we now rule, but it seems to be in line with the argument which we have pursued.

In Butts *v.* Little, 68 Ga. 272, it was held that a contract by a county for the erection of a building at a specified price, to be completed by a given date and payment to be made as the work progressed, was, in effect, a contract to pay the price agreed on by the date of completion fixed, and that where the amount of such price was more than could be lawfully raised by taxation, a debt was incurred, within the meaning of the constitution, and the contract was invalid, because it had not been authorized by a popular vote in the manner prescribed by the constitution. While the contract under consideration in that case was thus declared to be void, the judgment was reversed on terms; the effect of the decision being to authorize the making of a contract which would provide that the cost of the building as it fell due should be met annually by the levy of one-fifth of 1 per centum on the

assessed value of the taxable property of the county. This part of the decision seems to be based upon the idea that a county would have a right to anticipate a cuasal deficiency in the revenue which might arise in future years. It is not necessary to refer further to this decision, as anything said therein which is in conflict with the present decision was overruled in Lewis *v.* Lofley, *supra*.

In Cabaniss *v.* Hill, 74 Ga. 845, the ruling made in the case of Spann *v.* Board, *supra*, was followed, and in the opinion of CHIEF JUSTICE JACKSON, after a ruling to that effect, in referring to the particular facts of the case then under consideration, says: "But even if this contract does not create a debt, these orders were made payable only out of the proceeds of the taxes for the new jail in the year 1884. So far as they show an acceptance of the work of the movants,—a promise to pay the price fixed by contract if the work were satisfactory,—these orders are on the treasurer, not to be paid out of any general fund, or future levy of taxes, but out of a tax already levied for the jail, into which the work was to go and of which it was to become a part; and it may be that this provision in the orders, as payable out of money in sight, already provided for, might be construed into a sort of cash arrangement, and not a debt, in the sense of the constitution. If any thing can save it from being a new debt, it is this arrangement to pay out of funds, not in the treasury, it is true, but on the way to it." It is true it was held in that case that a county would not be compelled by *mandamus* to pay the claim, because the fund upon which the orders were drawn had been exhausted, and there was no fund with which to pay the debt, either in the treasury or on its way thereto. So far as the ruling in the case is concerned, it is in conflict with the views we now entertain, and the case must be, therefore, overruled, for the same reason that the case upon which the ruling was based is overruled.

In City of Conyers *v.* Kirk, 78 Ga. 480, 3 S. E. 442, it was held that "a municipal corporation can make a cash contract

for current supplies, such as lamps and gasoline for lighting the streets, through its appropriate officers or committees, as effectually as by formal order or resolution entered on its minutes." CHIEF JUSTICE BLECKLEY, in the opinion, says: "The facts of this case, taken most strongly in favor of the prevailing party, as they must be after verdict, do not show any purpose or intention to create a debt. The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment. When a cash purchase is made, there is no expectation that any debt will exist; and there was no such contemplation in this case. If we take the evidence, as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered, and the reason indicated in the record why payment was not then in fact made was the accidental absence of the city treasurer from his office; so that this debt (and it is a debt now) became such, not by virtue of making the contract, but by virtue of breaking the contract, and surely there never can be, and never will be, any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it, the cash sufficient for the purpose being then in the debtor's treasury." The decision, and the reasoning upon which it is based, is not in conflict with what we now rule, but both tend rather to support our conclusions than otherwise.

In Cartersville Improvement, Gas & Water Co. *v.* City of Cartersville, 89 Ga. 683, 16 S. E. 25, the conclusion reached was expressed in a headnote, which is as follows: "Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas on the credit of the city for a longer period than 1 year; and a contract which by its terms is to run for 20 years, each year's supply to be paid for quarterly during the year, is operative from year to year only so long as

neither of the parties renounces or repudiates it. Either of them can terminate it at the end of any year; but so long as it stands, and is complied with by one party, the other party must comply also." There was no opinion filed in the case. The conclusion reached in that case was, in our opinion, correct, and we believe that the reasons which have been heretofore given are sufficient to show that such is the case, and therefore we approve the ruling therein made and decline to overrule the decision. The decision in the case just referred to was followed in the case of Cartersville Waterworks Co. *v.* Same, 89 Ga. 689, 16 S. E. 70.

In Lewis *v.* Lofley, 92 Ga. 804, 19 S. E. 57, the case of Butts *v.* Little, *supra*, was overruled so far as it was in conflict with what was then ruled. The court there held that, "without the preliminary sanction of a popular vote, as required by the constitution, the public authorities of a county cannot contract for the building of a court house on the credit of the county for an amount in excess of funds in hand and the proceeds of taxation applicable to the object for the year in which the contract is made." JUSTICE SIMMONS, in the opinion, says: "We see no reason, therefore, why the county authorities in this case may not levy a sufficient tax in one year to pay for the erection of a court house, if the tax be not exorbitant; and, if they can do this, no reason now occurs to us why they cannot make a contract for its erection, the cost to be paid out of the taxes thus levied. If there are funds in the county treasury sufficient for the purpose, the county authorities may contract for its erection, payment to be made when the building is completed, or in installments as the work progresses; or, if taxes are levied, or can legally be levied, for the year, sufficient for the purpose, they may contract to pay for it out of such taxes, although they are uncollected." There was no ruling at all on the question now under consideration in the case of Dawson Waterworks Co. *v.* Carver, 95 Ga. 565, 20 S. E. 502.

In Board Com'rs Habersham Co. *v.* Porter Mfg. Co., 103

Ga. 613, 30 S. E. 547, the decision in Lewis *v.* Lofley was under review, and was in that case adhered to and reaffirmed. When we had under consideration the case last cited we saw no reason why the conclusion reached in Lewis *v.* Lofley was not sound, and we do not now see any reason for overruling or modifying either decision. Both of them seem to be in accord with our views as above expressed, and for that reason the conclusion reached in each case is adhered to and reaffirmed. It appears, therefore, that nothing that is herein said is in conflict with what has been heretofore ruled by this court, excepting the cases of Spann *v.* Board, Cabaniss *v.* Hill, and Butts *v.* Little. The first two cases are now overruled, so far as there is anything in either to conflict with what we now hold; and Butts *v.* Little, so far as it is inconsistent with the ruling now made, has never been followed, and has been to that extent expressly overruled, as we have seen, in Lewis *v.* Lofley. The conclusions reached, as well as the reasoning upon which such conclusions are based in all other cases, is not only not in conflict with what we now rule, but in entire accord with the same. It may, therefore, be now accepted as the settled law of this state that contracts of the character under consideration in the present case, so far as they attempt to provide for the payment of any sum other than that for the year in which the contract is made, create a debt, within the meaning of the constitution, and are subject, after the expiration of the first year, to repudiation by either party.

2. While it may not be necessary in the present case to decide whether the clause of the constitution under consideration requires legislative action prescribing the way in which the election therein provided for shall be held, my investigations have satisfied me that such legislative action is essential to the validity of the election. Same—Same—Elections.

The reasons which bring me to this conclusion will be stated, but on this question I am speaking for myself alone. Any liability which is a debt, within the meaning of the constitutional provision above quoted, cannot be incurred

without the assent of two-thirds of the qualified voters of the municipal corporation "at an election for that purpose, to be held as may be prescribed by law." In the case of Hudson *v.* City of Marietta, 64 Ga. 286, it was held, in a decision rendered by two justices, that, until the general assembly had by an act prescribed the manner of holding the election, a municipal corporation had no authority to incur a debt in order to make an exchange of fire engines in the fire department of the city. It was further held that "a mere vote on the question of exchange or no exchange, held under no law passed by the general assembly to carry into effect the mode of avoiding this prohibiton on new debts, and held under no law of the state or the city prescribed for such an election at any time, cannot be held to be such an authorization of a new debt as will comply with the constitution and relieve the city from the prohibition." JUSTICE JACKSON, speaking almost in the very atmosphere of the convention which adopted this constitution, after quoting the section with which we are dealing, uses this language: "It is not pretended that any law has been passed authorizing such increase of debt, or to hold such an election as is contemplated in the above-cited section; and the election actually held did not comply with the constitution. So that it is an effort on the part of this city to make a new debt, incurred to procure a steam fire engine in the place of an old hand engine, at a considerable cost, without complying with that provision of our present constitution. It cannot be done. The provision is inserted therein to stop—to dam up—this deluge of city and county debts, which is flooding the country and sinking the best interests of the people." When the constitution provides that no municipal corporation shall incur a debt until an election for that purpose shall be held "as may be prescribed by law," it undoubtedly contemplates that action by the general assembly is necessary in order to carry into effect the provision which authorizes municipal corporations, under certain conditions, to incur new debts. The decision above referred to clearly establishes this proposition.

See, in this connection, Elliott *v.* Gammon, 76 Ga. 766. There must be either a general law prescribing the manner of holding the election, or, in the absence of such general law, each municipal corporation desiring to incur a new debt must have express legislative authority prescribing the manner in which the election shall be held. The constitutional provision does not empower either municipal corporations existing at the time of its adoption or those created thereafter to deal with the subject of elections to incur debts. The constitution further contemplates that the debt incurred by municipal corporations may belong to that class known as a "bonded indebtedness," and it prescribes what shall be done by the municipality when the debt belongs to that class. Civ. Code, § 5894. That municipal corporations may incur debts other than a bonded indebtedness is also contemplated by the constitution, for it is therein provided that "municipal corporations shall not incur any debt until provision shall have been made by the municipal government." *Id.* § 5897. If a municipal corporation incurs a bonded indebtedness, it is required that there shall be the "assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." *Id.* § 5894. If the debt to be incurred is one other than a bonded debt, the constitution still requires, as above shown, that provision shall be made for the payment of the same, but the limitation placed upon the corporation in regard to bonded indebtedness is not imposed in regard to other debts. While municipal corporations may incur debts, both bonded and otherwise, still, whatever the character of the debt may be, if it does not come within the exception referred to in the clause of the constitution first quoted, the debt cannot be incurred until the assent of two-thirds of the qualified voters has been obtained at an election held in the manner prescribed by law.

3. The general assembly has prescribed the manner in which the election shall be held when the debt to be incurred

is a bonded debt. Pol. Code, § 377 *et seq.* It is provided that the city authorities shall give notice for the space of 30 days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named the election shall be held. In the notice the amount of bonds to be issued, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off, shall be specified. The election shall be held at all of the voting precincts within the limits of the municipality, and shall be held in the same manner, by the same persons, and under the same rules and regulations that elections for municipal officers are held; and the returns shall be made to the officers calling the election. In determining the question whether or not two-thirds of the qualified voters of the municipality voted in favor of the issuance of the bonds, the tally sheets of the last general election held in the municipality shall be taken as a correct enumeration of the qualified voters. Whether or not a registry of the voters is necessary at any such election depends upon the charter provisions of each city, as will be seen by reference to the following cases: Bell *v.* City of Americus, 79 Ga. 153, 3 S. E. 612: Gavin *v.* City of Atlanta, 86 Ga. 132, 12 S. E. 262; Kaigler *v.* Roberts, 89 Ga. 476, 15 S. E. 542; Howell *v.* City of Athens, 91 Ga. 139, 16 S. E. 966; Heilbron *v.* City of Cuthbert, 96 Ga. 312, 23 S. E. 206.

Same—Same—Same—Statutory Authority.

4. There is no general law of this state prescribing the manner in which an election shall be held by a municipal corporation on the question of incurring a debt other than a bonded debt, within the meaning of the constitutional provision above referred to. The general assembly has never expressly conferred upon the city council of Dawson the power to prescribe the manner of holding an election in that city for this purpose. In the absence of a general law providing for such election, and in the absence of a special law expressly conferring upon the municipality power to deal with this subject, is not any

Same—Same—Same—Same.

election held clearly without authority of law? See Hudson *v.* City of Marietta, cited *supra*. If it was necessary to so hold in the present case, there would be nothing in such a ruling to conflict with the decision of this court in Mayor, etc., *v.* Inman, 57 Ga. 370. The city authorities of Griffin had express legislative power, on a recommendation of a majority of citizens, either in public meeting or by public election, to subscribe for the stock of railroads, to borrow money on the faith and credit of the city to pay for the same, and to impose a special tax to meet the debt thus created. It was held that an amendment to the charter of the city, passed in 1859, which contained the provision above referred to was not repealed by that clause of the constitution of 1868 (article 3, § 6, par. 4) which declares: "No law shall be passed by which a citizen shall be compelled, against his consent, directly or indirectly, to become a stockholder in, or contribute to, any railroad, * * * except in the case of the inhabitants of a corporate town or city. In such cases, the general assembly may permit the corporate authorities to take such stock or make such contribution, * * * after a majority of the qualified voters, of such town or city, voting at an election held for the purpose, shall have voted in favor of the same, but not otherwise." It was further held that the amendment should be construed in connection with the clause of the constitution above quoted, and, thus construing the two together, the proper mode of taking the sense of the citizens in 1871 was to order a public election by all of the qualified voters of the city, with the privilege to each and every qualified voter to vote for or against the proposed subscription. The question as to whether, in such a case, a legislative act was necessary, was not involved, because there was a legislative act authorizing the city to hold the election, and the only question was as to who was embraced within the meaning of the term "citizen," as it was used in that act.

5. But, even conceding, for the sake of the argument, that no legislative action was necessary in order to authorize a

municipal corporation to call an election, we cannot hold that what was done by the city authorities of Dawson in this case was, in any sense of the word, a compliance with either the letter or the spirit of the constitution. The purpose of the constitution was to limit the amount of indebtedness that could be incurred by cities within the limit thus fixed, and to provide, with one single exception,—that is, the case of casual deficiencies of revenue,—that all debts incurred should have the assent of two-thirds of the qualified voters of the municipality. If the ordinance calling the election does not prescribe the amount of indebtedness to be incurred, and if the notice of the election does not fix an amount, no matter whether the vote be unanimous or not, the whole purpose of the constitutional provision is thwarted. To hold that such an ordinance and such a notice would give a municipal corporation the power to incur whatever debt is necessary to accomplish the object referred to in the ordinance and the notice would be simply conferring upon the city authorities unlimited power to do that which the constitution says that they shall not have authority to do. If two-thirds of the qualified voters of a city can confer upon municipal officers the power to incur an unlimited debt in order to provide waterworks, why may not the voters, instead of dealing with the subject of municipal expenses separately, simply empower the authorities to incur expenses necessary for waterworks, electric lights, police, and all other things needful for the successful administration of the city government, and thus avoid the expense and trouble of submitting these questions from time to time to the qualified voters. It seems to us that argument is unnecessary to establish the proposition that an election held under such a notice would be practically a nullification of the constitutional provision. If we are correct in this, the ordinance passed by the city authorities of Dawson, providing for an election, and the notice published in pursuance thereof, was not such a compliance with the constitution as would authorize them to incur any debt whatever. And this view

Same—Same—Same.

of the case is strengthened when we take into consideration that the election was held in 1886, and the contract claimed to have been made pursuant to that election was not made until 1890, four years later, and that there is nothing to indicate that the people who voted at the election had the slightest conception of the amount of debt to be incurred, when to be paid, or of the details of the contract of indebtedness, which it is not claimed they assented to by voting in the election. The policy of the constitution is against the incurring of municipal debts, and therefore the constitutional provision prescribing the manner in which debts must be incurred is to be strictly construed. It has been the uniform ruling of this court that, not only the constitutional provision must be strictly construed, but that the act of the general assembly prescribing the manner in which an election shall be held on the question of bonded indebtedness shall be also strictly construed. Walsh *v.* City of Augusta, 67 Ga. 293; Cabaniss *v.* Hill, 74 Ga. 845; Bowen *v.* City of Greensboro, 79 Ga. 709, 4 S. E. 159; Hemerick *v.* City of Athens, 89 Ga. 674, 16 S. E. 72; Ponder *v.* City of Forsyth, 96 Ga. 572, 23 S. E. 498; Mayor, etc., of Perry *v.* Norwood, 99 Ga. 300, 25 S. E. 648. While an examination of the cases cited will probably show that in the later cases there has been some departure from the very strict rule of construction laid down in the earlier decisions, no such departure has taken place as would justify us in holding that the notice of an election where the question of incurring a debt is to be decided would be sufficient when the amount of the debt to be incurred was not in any way specified, either in the ordinance calling for the election or in the notice. In the case of Irvin *v.* Gregory, 86 Ga. 605, 13 S. E. 120, it was held that, in an election held to determine whether a school law should be adopted, a failure to publish the notice of the election the number of times required by law would be held to be a mere irregularity after the election had been held and the result acquiesced in by the citizens. In the case of Brand *v.* Town of Lawrence-

ville (Ga.) 30 S. E. 954, it was held that, "though the notice of the election provided for by such an act may not in the clearest and most unequivocal terms have submitted to the qualified voters the question of adopting the act itself, yet, where the terms of the notice were such as to show that this question was necessarily to be passed upon in the election, the failure to use more explicit language in this respect (the notice, as to all other matters, being sufficient) will, after the election has taken place, and after the bonds in pursuance of its result have been issued and sold, and their proceeds applied as required by the act, be treated as a mere irregularity, not invalidating the bonds, and one of which it is too late for a taxpayer, who participated in the election and who had knowledge of all the facts, to complain."

6. It is contended, however, that the city authorities should not be allowed to set up the defense insisted upon in this case, because the waterworks company, upon the faith of the contract, has expended a large amount of money in constructing the plant necessary to operate the system, and that it would be such a fraud upon them to now refuse to pay that the municipal authorities should be estopped from setting up the want of power to make the contract sued upon. All persons who deal with public officers act at their peril, and are charged by law with notice of the authority of the officers with whom they deal. If the city authorities of Dawson had no power under the constitution and laws of this state to hold the election, and make the debt claimed to have been incurred in pursuance thereof, the waterworks company is charged with notice of such want of power; and it cannot be said to be a fraud upon it to set up a defense based upon a fact of which it was charged by law with notice. Even if a benefit has been received by one of the contracting parties from a contract which is void because prohibited by the constitution, or because contrary to public policy, the receiving of such benefit will not prevent the party receiving it from setting up against a suit to enforce the contract the defense that

Municipal Contracts—Ultra Vires—Estoppel.

the contract was illegal and void. See Covington & M. R. Co. *v.* City of Athens, 85 Ga. 367, 11 S. E. 663. To establish the rule that all that is necessary to prevent a city from pleading that under the constitution and laws of the state it could not incur the indebtedness sought to be charged against it would be to show that the alleged illegal contract had been fully performed on one side would place entirely within the power of persons desiring to make illegal contracts the determination of the question as to whether the constitution of the state shall be enforced in a particular instance. Where a municipal corporation has the power to incur a debt, and the debt is incurred in an irregular way, it is settled law that the innocent holder of a negotiable instrument issued by the authorities of such city, and which recites a compliance with the law in regard to the incurring of the debt, will be entitled to prevail in a suit to enforce the collection of such instrument, notwithstanding a defense setting up the irregularities in the manner in which the debt was incurred. Black *v.* Cohen, 52 Ga. 621. The contest in the present case being between the original parties to the contract, and no negotiable instrument ever having been issued, the law in relation to the innocent holders of such instruments has no application whatever. The promoters, who were afterwards incorporated as the Dawson Waterworks Company, were charged by law with knowledge of what the constitution and statutes of this state required in regard to such contracts, as well as what had transpired in the city of Dawson, and now claimed by them to be a compliance with the law in regard to the incurring of debts; and it being, as we have shown, not within the power of the city of Dawson to make the contract, no estoppel is raised by law to prevent the city authorities from calling in question the legality of the contract relied on by the defendant in error.

7. When this case was here before (29 S. E. 755), it was ruled that, "this being an action against a municipal corpo-

ration for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the constitution of this state, made due and lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff." There is nothing in our present ruling which conflicts with this decision. Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record. The record in the case did not disclose an ordinance which made provision for the debt; and if all of the other constitutional and statutory requirements had been present, the absence of this ordinance would have required a reversal of the case. The extent of the ruling in that case was simply that without such an ordinance there could be no cause of action, and whether the other elements necessary to constitute the cause of action were present was not passed upon.

Former Decision.

8. While either party to the contract in question can terminate it at the end of any year, as long as it stands and is complied with by one party, the other must comply also. Ford *v.* City of Cartersville, 84 Ga. 213, 10 S. E. 732; Lott *v.* City of Waycross, 84 Ga. 681, 11 S. E. 558; Cartersville Improvement, Gas & Water Co. *v.* City of Cartersville, 89 Ga. 683, 16 S. E. 25; Dawson Waterworks Co. *v.* Carver, 95 Ga. 565, 20 S. E. 502.

Benefits Received—Liability of Municipality.

9. As the judge was not authorized to direct a verdict for the plaintiff on the ground that the contract was valid, and therefore the amount due thereon should be paid according

to the terms thereof, the question arises, was the evidence of such a character as to demand a finding in favor of the plaintiff upon the theory that the defendant had received benefits from the contract during the year 1895, and was for that reason liable for the amount stipulated in the contract to be paid annually? After a careful examination of this record, we cannot say that the evidence demanded this finding. While the great preponderance of the evidence is in favor of such finding, there is some evidence upon which a jury could base a finding in favor of the defendant; and we think that the case should have been submitted to a jury under proper instructions. If the jury should believe that the city council of Dawson maintained its fire department intact during the year 1895, without any substantial change as to its organization or rules from what it had been in previous years, and had failed to notify the officers and members of this department of its intention to abandon the contract with the waterworks company, and also failed to provide any appliances or means to extinguish fires independently of the water which would be furnished by the waterworks company, and did in fact, during the year in question, make use of the water of the plaintiff company to extinguish a fire or fires, they would be authorized to find that the resolution, passed in 1894, terminating the contract with the waterworks company at the end of that year, even if passed in good faith, was not adhered to in good faith, and that the acts above recited, if true in fact, amounted to a waiver of the resolution, so far as payment of the amount due under the contract for 1895 was concerned. If, on the other hand, a jury should believe that the resolution terminating the contract was passed in good faith, that the city authorities did all in their power to carry it into effect, and that they notified the officers and members of the fire department that the contract was terminated, and that the water was not to be used, and persisted in the refusal to use the water, or to permit any one to use the water, in behalf of the city, on any occasion, a verdict in favor of the

Conflicting Evidence—Directing Verdict.

Note

defendant would not be without evidence to support it. Judgment reversed. All the justices concurring; SIMMONS, C. J., specially.

SIMMONS, C. J. (concurring specially). This court having held, when this case was here before, that the contract between the city and the waterworks company created a debt, I am bound by that decision. It is the law of this case, whether it was right or wrong. The majority of the court having determined not to overrule the cases on the same line, I am likewise bound by them. If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the supreme court of the United States, when construing similar provisions of constitutions or statutes, that the making of a contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum to be paid annually, is not a debt, within the meaning of the constitution. It is difficult for me to understand now, after full argument and reflection, how the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it, and taxes are to be levied to meet the obligation, is not a debt, when, if the same authority makes a contract for the same purpose for two years, or five years, it is a debt.

NOTE.

Municipal Contracts for Water Supply.—Where the indebtedness of a municipality has reached the prescribed limit, it cannot enter into a contract for the supply of water for a fixed annual sum if no steps are taken to raise by taxation the necessary moneys to meet the liability as it accrues. State *v.* Atlantic City, 49 N. J. L. 558, 17 Am. & Eng. Corp. Cas. 592; Prince *v.* Quincy, 105 Ill. 138, 2 Am. & Eng. Corp. Cas. 66, 44 Am. Rep. 785; Davenport *v.* Kleinschmidt, 6 Mont. 502, 16 Am. & Eng. Corp. Cas. 301; East St. Louis *v.* Flannigan, 26 Ill. App. 449; Salem Water Co. *v.* Salem, 5 Oreg. 30; Buchanan *v.* Litchfield, 102 U. S. 278; Fuller *v.* Chicago, 89 Ill. 282. See also Comstock *v.* Syracuse, 5 N. Y. Suppl. 874.

Note

A contract entered into by a city whose indebtedness has already reached the constitutional limit, to pay for a supply of water for fire purposes in monthly instalments, is within the prohibition of the Illinois Const., art. 9, § 12, which declares that "no municipal corporation shall become indebted in any manner" beyond a specified limit. Prince *v.* Quincy, 128 Ill. 443, 26 Am. & Eng. Corp. Cas. 498.

It has, however, been held in Michigan that where a city charter prohibits its common council from contracting debts or incurring liabilities exceeding in any one year the revenue of such year, unless authorized to do so by a majority vote of the electors of the city, a contract made without such vote for a water-supply, to run thirty years, would create a liability against the city to the full extent of the thirty-years' rental, which aggregate liability, being in excess of the revenue authorized to be raised within any one year, would render such contract void and of no effect. Niles Water-Works *v.* City of Niles, 59 Mich. 311, 11 Am. & Eng. Corp. Cas. 299.

Where a municipality has the power to contract with a water company for the term of ten years, a contract to run twenty years would be void. State of Jersey *ex rel.* Davies *v.* Town of Harrison, 46 N. J. L. 79.

But in Grant *v.* Davenport, 36 Iowa 396; Dively *v.* Cedar Falls, 27 Iowa 233, and Utica Water Co. *v.* Utica, 31 Hun (N. Y.) 431, it is held that a contract entered into by a city for the supply of water for a term of years at a fixed annual rate, is one relating to the ordinary expenses of the city, and the rate agreed to be paid is not an indebtedness prohibited by the constitution.

Where a city enters into a contract with a water company to run for a term of years, the agreed price to be paid monthly, which sum for any one year will not exceed the constitutional limitation, but, taken for the term said contract was to continue, would be in excess of the debt it was authorized to incur, it has been held that such contract was not prohibited by the constitutional provision, but was legal and binding; there being created no present indebtedness for the whole sum, but only as the water should be supplied from month to month. E. St. Louis *v.* E. St. Louis G. L. & Coke Co., 98 Ill. 415.

And under a Massachusetts statute, which enacts that towns shall not incur debt except in the manner prescribed by the act, it was *held* that a town is not restricted in its power to contract for a supply of water, the consideration therefor to be paid monthly. The court declared that it was in effect a cash transaction where the payments were made *pari passu* with the incurring of liability. Smith *v.* Dedham, 144 Mass. 177.

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In Valparaiso *v.* Gardner, 97 Ind. 1, the court held that the inhibition of the Indiana constitution did not apply to contracts for water to be paid as the water was furnished, provided it was shown that the contract price should be paid from the current revenues as the water was furnished, and without increasing the indebtedness beyond the constitutional limit. Valparaiso *v.* Gardner, 97 Ind. 1, 49 Am. Rep. 416.

An ordinance which authorizes the construction of water works within the city, and provides that the city shall have the right, when its financial condition may permit, to purchase the works, is not an incurring of indebtedness within the prohibition of the constitution. Burlington Water Co. *v.* Woodward, 49 Iowa 58.

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v.
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(*two cases*). (L. A. 655 and 656.)

LOS ANGELES CITY WATER CO. *v.* CITY OF LOS ANGELES *et al.* (L. A. 657.) CRYSTAL SPRINGS LAND & WATER CO. *v.* SAME. (L. A. 658.)

(*Supreme Court of California, May 5, 1899.*)

Water Supply—Contract between City and Company—Modification—Implied Consent.—A contract between a city and a water company, under which the company undertook to supply the public with water, contained a clause providing that the company should not take from the river "more than ten inches of water without the previous consent" of the city. But the company, soon after the execution of the contract was using 300 inches, and continued to use that amount or more, as the public demand for water increased, until near the expiration of the contract, which was for 30 years. *Held*, that the city, having allowed the water company for nearly 30 years to divert such quantity of water, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its implied consent within the period of the contract.

Construction of Contract.—Such contract was one by which the city agreed to give possession to the water company of a small line of wooden pipes, and to allow the company to build new waterworks

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throughout the city as necessity demanded, with covenants on the part of the company that it would substitute better waterworks for those of the city, and would create new works as the demand of the city required; that the company should have the right to do this, and to collect water rates for a period of 30 years, in consideration of such covenants of the company, and that upon the expiration of 30 years the city would pay the company for all the works created by the latter, and that the company, upon payment therefor, should then deliver possession of all the waterworks, as they should exist at the end of the period, to the city. *Held*, that such agreement was in fact a contract, and not a lease, as contended by the city; and that the company was not bound to deliver possession of the waterworks until paid therefor.

Right to Obtain Water Supply from River—Water Company—Contract with Rate Payees—Rights of City.—The city had not the right of a riparian owner to have the water of the stream flow as it was accustomed to flow, but only the right to the use of such an amount of the water of the river as was necessary to supply the wants of its citizens and the municipality; and it was entitled to such use only when in a position to exercise it; and it was not in such position, as it had no system of waterworks. *Held*, the city, until it had entirely ended the contract by paying for the company's works, could not interfere with the contract between the company and the rate payers, and appropriate the benefit of that contract; nor, through the appointment of a receiver for the company, prevent it from enjoying the fruit of such contract.

Right to Enjoin City from Taking Possession of Waterworks.—As the city, under its contract with the water company, had no right to take possession of the works of the latter, it was properly enjoined from using its municipal power to take such possession forcibly.

APPEAL by both parties from Los Angeles county superior court.

In two of the actions there were orders enjoining defendants from taking possession of certain waterworks property, and they appeal. In another action the court made an order appointing a receiver to receive the water rates and income from such waterworks property, but refusing to appoint him to take possession of the property, and both parties appeal. By agreement the appeals were argued and submitted at the same time. The orders in the first two

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mentioned actions were affirmed, and in the other action the order appointing the receiver was reversed, and the refusal to appoint affirmed.

W. E. Dunn and *Lee & Scott*, for city of Los Angeles.

J. S. Chapman and *White & Monroe*, for water companies and *S. G. Murphy*.

Case Stated.

McFARLAND, J. These four appeals are taken by the various parties from certain orders made in three certain actions pending in the superior court of the county of Los Angeles. One of the three actions was entitled "Los Angeles City Water Company, Plaintiff, *v.* The City of Los Angeles and the Persons who Constituted the Mayor and Common Council of said City," and in that case the appeal is by the defendants in said action from an order of the court below enjoining and restraining the defendants from taking possession of certain waterworks property hereinafter mentioned; and this is the appeal numbered L. A. 657. Another of said actions is entitled "Crystal Springs Land and Water Company, Plaintiff, *v.* City of Los Angeles *et al.*, Defendants," and the appeal in that case is by the defendants from a similar order enjoining and restraining the defendants from taking possession of certain waterworks described in the complaint therein. This is the appeal numbered L. A. 658. The other of the three actions is entitled "The City of Los Angeles, Plaintiff, *v.* The Los Angeles City Water Company and The Crystal Springs Land & Water Company," above mentioned. In this action the plaintiff sought to have a receiver appointed to take possession of the waterworks property above mentioned, and to restrain the defendants therein from collecting water rates, or receiving any income from said property. The court made an order appointing a receiver to receive the water rates and income from said property, but refused to appoint a receiver to take possession of the property. The defendants therein appealed from the order appointing the receiver, and this is the appeal numbered L. A. 655. The city of Los Angeles appealed from

that part of the order which denied a receiver for the purpose of taking possession of the property, and this is the appeal numbered L. A. 656. The three cases were not consolidated in the court below, but they were heard, and the orders appealed from were made, at the same time. By agreement between the parties the appeals were all brought here in the same transcript, and were argued all together, and submitted at the same time.

The litigation in all the cases arose out of a certain written contract made on the 22d day of July, 1868, and the determination of the rights of the various parties depends upon that contract, and upon facts occurring subsequently to its execution. The municipal name of the city of Los Angeles was at that time "The Mayor and Common Council of the City of Los Angeles," and by that name the city was the party of the first part to the contract, and John S. Griffin, Prudent Bradbury, and Solomon Lazard were the nominal parties of the second part; but as the municipality afterwards took the name of the city of Los Angeles, and as Griffin and others, shortly after the execution of the contract, assigned all their rights therein to the Los Angeles City Water Company, which assignment was anticipated by both parties at the date of the contract, we will, for convenience, speak of one of the parties as the city of Los Angeles and of the other as the Los Angeles City Water Company. Facts occurring after the execution of the contract are shown in the record by various affidavits and other evidence.

At the time of the execution of the contract the city owned a water plant of a very meager character. It consisted mainly of a water wheel and a few miles of wooden pipe. By the contract the city covenanted and agreed "to deliver and concede" to the parties of the second part, their heirs, assigns, etc., the exclusive use, control, possession, and management of the waterworks, together "with the right to sell and distribute water for domestic purposes, and to receive the rents and profits thereof for their own use and benefit, except as hereinafter provided, hereby giving and

granting the parties of the second part * * * the right to lay pipes in any and all the streets of said city, and to dig and make all necessary excavations for that purpose, and the right of way through, upon, and over land or streets belonging to the said city of Los Angeles, with the additional right to take water from the Los Angeles river at a point above or near the present dam: provided always, that the said parties of the second part * * * shall at no time take from the said river for the use of said waterworks more than ten inches of water without the previous consent of the mayor and common council of said city." This grant was made upon the consideration that the parties of the second part should pay to the city $1,500 per annum "until the conclusion of the term of this contract;" that they should surrender to the city certain claims which they held against the city for damages; and upon the further consideration that they should make certain improvements "about, in, and upon said waterworks, at their own proper costs and expenses," to wit, that they should lay down 12 miles of iron pipes of sufficient capacity to supply the inhabitants of the city with water for domestic purposes, that they should erect one hydrant, as a protection against fire, at each corner of each cross street where "the water pipes are now, or may hereafter be laid by virtue of this contract;" that they should erect an ornamental fountain upon the public plaza at a certain cost; and that they "should within two years from the approval of this contract and ordinance construct at their own expense such ditches, flumes, or erect such machinery in connection with said waterworks as will secure to the inhabitants of said city a constant supply of water for domestic purposes, and shall construct reservoirs of sufficient capacity for that purpose." The parties of the second part agree "that they will make the improvements hereinbefore mentioned and set forth in the following manner, to wit: That they will replace all the wooden pipes now belonging to the said waterworks within one year from the signing and approving of this contract and ordinance, and that they will

extend said iron pipes as fast as the citizens desiring to be supplied with water for domestic purposes will agree to take sufficient water to pay ten per cent. per annum interest upon the cost of extending such pipes through the streets now supplied with water. That they will, within one year from the date hereof, place a hydrant, to be used as a protection against fire, at one corner of one street at each of the cross streets where the pipes are now laid down, and will erect hydrants at other street corners, according to the terms of this contract, as fast as the pipes are extended through the streets of said city. That they will erect or cause to be erected an ornamental fountain upon the public plaza, of such design as the mayor and common council shall direct, within one year from the date hereof. That they will furnish water for the public schools and city hospitals, jails, free of charge, when the same are near the pipes, the city furnishing the necessary conduits for that purpose. That they will make all the improvements herein mentioned and set forth, and keep the same in repair, at their own cost and expense, for the said period of thirty years, and return the said waterworks to the said party of the first part at the expiration of the said period of thirty years in good order and condition, reasonable wear and the damage of the elements excepted, upon the payment to them of the value of the improvements made after the approval of this contract, to be ascertained as hereinbefore provided, * * * and will pay all state and county taxes assessed upon said waterworks during the said period of thirty years." Another provision is to the effect that the parties of the first part "shall have and do reserve the right to regulate the water rates charged by the said parties of the second part, or their assigns: provided, that they shall not so reduce such water rates or so fix the price thereof to be less than those now charged by the said parties of the second part for water." There is also an agreement by the parties of the second part that a certain lease theretofore executed by the city to one Sansevaine shall be surrendered up and canceled. There is

also a provision that the rights conceded to the parties of the second part shall not embrace certain waterworks of the city used for the distribution of water for the purpose of irrigation, except as to the 10 inches of water before mentioned; and the parties of the second part covenant that they will not dispose of any water for the purposes of irrigation, "but shall only take from said river the water necessary for domestic purposes as above specified." The parties of the first part covenant "that at the expiration of the period of thirty years from the execution of this instrument they will pay to the said parties of the second part * * * the value of the improvements made in, about, and upon the said waterworks in pursuance of this contract; the same to be ascertained by arbitration, in case the parties cannot agree upon the value thereof, the said party of the first part and the parties of the second part * * * to choose one man each, and the two men thus chosen to select a third man, and the judgment of the three men thus selected shall be final in the premises. And the said party of the first part hereby covenants and agrees to make no other lease, sale, contract, grant, or franchise to any person or persons, corporation or company, for the sale or delivery of water to the inhabitants of said city for domestic purposes during the continuance of this contract, always without prejudice to any rights already granted." The foregoing are, we think, all the parts of said contract necessary to be now stated. Other parts of the contract may be hereafter noticed; and other facts disclosed by the record which are material in the case will be presently stated.

At the date of the execution of the contract the city of Los Angeles contained only from 5,000 to 6,000 inhabitants, and its boundaries were confined to four square leagues of land. At the termination of the 30 years, in 1898, its population was over 100,000, and its boundaries had been extended in several directions so as to include from 10 to 15 additional square miles. As fast as this increase in area and population

took place, the water company, at vast expense, extended its pipe lines, reservoir system, and other necessary parts of a water plant so as to supply the growing wants of the city and its people. It extended its lines outside of the territory over which the city had municipal jurisdiction at the date of the contract, and acquired from others reservoirs and water property which were on the new territory, and constructed upon land which the city did not own, and through streets which had no existence in 1868. Throughout all the territory, old and new, it furnished free water for hydrants, fire apparatus, school purposes, etc., as the increasing population and settlement demanded. It is quite clear from the record that the company substantially complied with all its covenants in the contract.

The 30 years mentioned in the contract ended on the 22d day of July, 1898. When that date was near at hand, the city had made no arrangements to pay for the improvements, and had made no tender of the value thereof. On the other hand, it claimed the right to take possession of all the waterworks property without any previous payment of the value thereof, and threatened to take such possession immediately at the termination of the 30 years. It claimed to be in the position of a lessor, with the right of possession at the end of the term. There had been no fixing of the amount of the value of the property by arbitration. The city had no money in its treasury with which to pay for the value of the property. There was a great difference of opinion between the two parties as to such value. The city, however, admitted that the value was as much as $1,000,000, and it is quite apparent that under the law it had no means to raise that amount of money except by the issuance of bonds, which would have to be sanctioned by a vote of the electors of the city, and thus the prospect of its ability to pay was distant and contingent upon the consent of the electors. Under these circumstances the Los Angeles City Water Company, a few days before the expiration of the 30 years, brought the action hereinbefore alluded to, to restrain the city from taking possession of the

property out of which the appeal No. 657 arose. The Crystal Springs Land & Water Company, it is proper to say here, is a corporation which owns, or claims to own, a certain water plant which it had leased to the Los Angeles City Water Company, the pipes, plants, etc., of the former company connecting with the works of the latter; and there is a contention between the parties as to whether or not the property, or at least a part of it, claimed by the Crystal Springs Company, belongs to the Los Angeles Water Company, and is part of the property which the city should have under the said contract. As the city also threatened to take possession of part of the property claimed by the Crystal Springs Company, the latter also brought an action against the city to prevent that threatened action of the city, at the same time the action just above referred to was brought by the Los Angeles City Water Company, and, so far as these present appeals are concerned, no adjudication as to the relationship between these two water companies is necessary. The court granted the injunction in the said suit of the Crystal Springs Company against the city. Shortly after the commencement of the two last-mentioned cases, the city commenced the action hereinbefore mentioned for the appointment of a receiver to take possession of the property of the said two water companies, and to manage and control the same. An order was made in said action appointing a receiver to collect and receive the rents, issues, and profits of said property, "including water rates" derived from the sale of water by the Los Angeles Water Company to the people of the city; as well those which had accrued since the filing of the complaint as those which should accrue thereafter. By said order the defendants were ordered to pay to the receiver all moneys in their possession derived from the water rates since the filing of the complaint, including those which had been deposited in the Farmers' & Merchants' Bank of Los Angeles under a stipulation between the parties to the effect that the money should be deposited in said bank temporarily during the hearing of the motion for a receiver. The

appeal by the water companies from this order is the most important one now before the court.

Before considering the main questions in the case, it is proper here to notice a preliminary point made by the city, and somewhat insisted on, to wit, that the only quantity of the water of the Los Angeles river to which the water company is entitled under the contract is 10 inches under a 4-inch pressure. This contention cannot be maintained. The words of the contract on this subject are simply that the company shall not take from the river "more than ten inches of water without the previous consent" of the city. There is nothing in the contract about "four-inch pressure," nor is there any intimation as to what the parties meant by "ten inches" of water. But, looking at the context and the subject-matter of the contract, it is quite evident that the parties did not mean only 10 inches under a 4-inch pressure. If that had been the meaning, there would have been no sense in the other important covenants. At the time of the contract it would have taken many times 10 inches under a 4-inch pressure to furnish water for domestic purposes to even the few thousand people who were then inhabitants of the city, and much more than that amount was necessary to supply free water under the contract; and a solemn covenant to supply a growing city with sufficient water for domestic and municipal purposes for 30 years from a flow of 10 inches under a 4-inch pressure would have been absurd. The company, immediately after the date of the contract, commenced to use an amount of water greatly in excess of 10 inches under a 4-inch pressure. Soon after the execution of the contract the company was using 300 inches under a 4-inch pressure, and from that to the present time they have been using, with the knowledge and consent of the city, from 300 to 700 inches so measured. Therefore, whatever (if anything) was meant by the simple words "ten inches," the contract was immediately, and has

Water Supply—Contract between City and Company—Modification—Implied Consent.

been continuously, construed by the action of the parties as meaning more than 10 inches measured under a 4-inch pressure. There is no pretense that the city ever objected to the use of this water by the water company until 1896, when an ordinance was passed by the city government undertaking to withdraw the city's consent to the taking of more than 10 inches from the river. It is difficult to imagine how this ordinance was passed seriously, for if the water company had been prevented from taking from the river at that time more than 10 inches of water under a 4-inch pressure, there certainly would have been a water famine in the city, for the city had no works of its own, and no means whatever for supplying water for either domestic or municipal purposes. But the city, having allowed the water company for nearly 30 years to divert the quantity of water above mentioned, and to expend vast sums of money upon the faith of a continuance of the right to take said water, could not withdraw its consent within the period of the contract. This same contention was made by the city in the case of Los Angeles City Water Co. *v.* City of Los Angeles (U. S. Cir. Ct. S. D. Cal.) 88 Fed. 745; but the court held otherwise. In that case WELLBORN, the learned judge holding the court, said: "If it be conceded, as claimed by defendants (which, however, I do not decide), that the provision of the contract limiting the quantity of water to be taken from the river without previous consent of the city is sufficiently certain for enforcement, or, more specially, that said quantity is ten inches measured under a four-inch pressure, still the consent of the city to the taking of a greater quantity, once given, cannot be withdrawn during the life of the contract, for the reason that large expenditures have been made by complainants in reliance upon such consent." The court cites, as authorities to the point, Rhodes *v.* Otis, 33 Ala. 600; Woodbury *v.* Parshley, 7 N. H. 237; Lacy *v.* Arnett, 33 Pa. St. 169; Russell *v.* Hubbard, 59 Ill. 339; Beall *v.* Mill Co., 45 Ga. 33; Veghte *v.* Power Co., 19 N. J. Eq. 153; Railroad Co. *v.* Battle, 66 N. C. 546; Flickinger *v.* Shaw, 87 Cal. 126, 25

Pac. 268; Grimshaw *v.* Belcher, 88 Cal. 217, 26 Pac. 84; Smith *v.* Green, 109 Cal. 228, 41 Pac. 1022,—all of which sustain the point.

The main question in these cases is this: Had the city the right to take possession of the waterworks at the end of the 30 years without paying for the same or tendering payment? If this question should be answered in the negative,—and we think it should,—then it seems to clearly follow that all the orders of the court below appealed from on these appeals must be affirmed, except the one appointing the receiver, and this latter order must be reversed. The city undertakes to contend that the contract is a lease,—a lease pure and simple; and as the contract, according to the city's contention, must be thrown into the category of a "lease," it contends for one of the well-known features of a lease of land, to wit, that at the expiration of the term the lessor has an immediate right of re-entry and possession. This position is not tenable. The written instrument in question cannot be categoried into any smaller class than that of a "contract." It is a contract with many and various covenants. It was not called a lease (however suggestive that might have been) by the parties who made it. The city entered into the contract by means of an ordinance which was entitled "An ordinance contracting for the care, maintenance, and improvements of the city waterworks." The first section says that "the contract" hereinafter set forth, etc. The second section describes it as "this agreement." It was afterwards said "that at the expiration of the period of thirty years from the execution of this instrument they will pay," etc. In another part of the instrument it is called "this contract and ordinance." In another place it speaks of "the terms of this contract." In another place it speaks of "the approval of this contract." The only place where there is any reference whatever to the contract as a lease is the agreement that the party of the first part will "make no other lease, sale, contract, grant, or franchise to any person or persons;" and this language can as well

Construction of Contract.

be construed as designating the instrument a "sale, contract, grant, or franchise" as designating it a "lease." In the opinion of the court below it is well said as follows: "I do not perceive any theory which justifies the contention that the agreement is a lease as to the pipe lines, flumes, and other 'improvements' constructed by the water company. Manifestly, the city could not lease what it never had, and the present distributing system did not exist at the time the agreement of 1868 was executed. If fact, the system then existing has been entirely superseded, and constitutes no part of the present plant. Neither can it be said with any show of reason that the distributing pipes and reservoirs constructed by the water company constitute improvements on the leased property, and revert therewith, and as part thereof, upon the termination of the lease." The instrument in question could as well be called a "contract to purchase," with all the incidents of such a contract following, as a "lease." It is, in fact, a contract by which the city agreed to give immediate possession to the water company of a small line of wooden pipes which the city then owned, and to allow it to build new waterworks throughout the city as necessity demanded, with covenants on the part of the water company that it would change what little the city had then in the way of waterworks into better ones, and would create new works as fast as the demands of the city required; that the water company should have the right to do this, and to collect water rates for a period of 30 years in consideration of the covenants entered into by the water company, and that upon the expiration of 30 years the city would pay the company for all the works which it should have created, and that the water company, upon payment therefor, should then deliver possession of all the waterworks, as they should exist at the end of the period, to the city. The rights of the parties do not rest upon legal implications. They are determined by covenants expressly stated in the contract. These are that the city should pay for the works to be created by the water company and, that the company should deliver pos-

session thereof to the city "upon the payment" to it of the value of such property. There is no agreement, express or implied, that the company should yield up possession before payment. Even in the case of a strict lease of land, where the lessee is to erect improvements to be paid for by the lessor at the expiration of the term, the lessor is entitled to possession at the end of the term without payment—leaving the tenant to his action to recover the value—only where there is no express agreement in the instrument which changes the result that flows by implication from the mere nature of a lease. In such a case, if the clear meaning of the contract is that the lessor is to have possession only upon payment, then he has no right to possession prior to payment. Such a case is presented in Swift *v.* Sheehy, 88 Fed. 924. There the court say: "There is in this contract, distinguishing it from the cases principally relied upon by the defendant's counsel, an express provision that the lessor can only become the owner of and entitled to the possession of the buildings and improvements upon the payment to the lessees of the value thereof. * * * At common law, under a contract of lease by which the lessee was permitted to make improvements upon the land during the existence of his lease, without further express reservation as to the termination of the term, the improvements went with the land back to the lessor. The contract in question does not only require the lessor, at the termination of the lease, to pay the lessee the value of the improvements, but it, in effect, entitles the lessees, to retain the ownership and possession until the lessor shall pay them therefor."

But the case of National Waterworks Co. *v.* Kansas City (decided by JUDGE BREWER) 10 C. C. A. 653, 62 Fed. 853, more nearly approaches the case at bar than any to which our attention has been called. In that case the contract between Kansas City and the waterworks was very similar to the one in the case at bar. There the contract ran for 20 years. The water company was to create waterworks, which the city was to have at the expiration of 20 years upon payment

of the value; and a trial court had held that at the end of the 20 years the city was entitled to take possession of the waterworks without payment. But the circuit court of appeals reversed the case, and JUDGE BREWER, in delivering the opinion of the court, among other things, said: "We dissent *in toto* from the claim of the city that at the lapse of the twenty years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. * * * Now, the familiar and ordinary law of business transactions is that he who parts with title receives at the time payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provides that no grant so made shall confer the right to operate the waterworks for any period beyond twenty years, yet such provision is no more imperative than the one that at the expiration of the twenty years the city shall purchase and pay therefor. * * * In so far, therefore, as the decree of the circuit court attempts to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous." Our conclusion therefore is, both upon principal and authority, that the city at the expiration of the 30 years had no right to the possession of the waterworks without payment, or tender of payment, of their value.

The court below, when appointing a receiver to collect the water rates and enjoining the water company from collecting such rates, seems to have laid stress upon the con-

sideration that the city was the owner of the water in the Los Angeles river which is used through the waterworks of the water company. It seems to have been determined, however, that the city has only the right to the use of such an amount of the water of the river as is necessary to supply the wants of its citizens and of the municipality. It has not the right of a riparian owner to have the water of the stream flow as it is accustomed to flow, without any regard to its use. It is entitled to the use of the water only when it is in a position to use it, and could not recover damages for its diversion except when it was in a position to use it; and it is apparent that it is not in such position, for it is not in possession of any system of waterworks through which such use could be exercised. It is doubtful if the city, having encouraged the water company in making such large expenditures of money to perfect its system, could enjoin the company from continuing to use the water until the city had entirely ended the contract by paying for the company's works. But, whether or not it could enjoin the company from using the water, there is no principle upon which it could interfere with the contract between the water company and the rate payers, and appropriate to itself the benefit of that contract; and having no right to the possession of the waterworks, or in the contract between the water company and the rate payers, we see no principle upon which, through the appointment of a receiver, it can prevent the water company from enjoying the fruits of its contract with the rate payers.

Right to Obtain Water Supply from River—Water Company—Contract with Rate Payers—Rights of City.

With respect to the equitable remedy of the water company to enjoin the city from taking possession of the waterworks, we do not see how the city can complain. Not having the power to take possession of the property rightfully, it is just and equitable for the water company to enjoin it from using its municipal power to take such possession forcibly. In that event, considering the present inability of the city to pay, and the fact that there is no method by which the water company could compel

Right to Enjoin City from Taking Possession of Waterworks.

payment within any reasonable time, if at all, the water company would have no remedy that would be in any sense adequate; and we think, therefore, that the remedy by injunction was an entirely proper one. And, in accordance with the views above expressed, there is no just ground for the appointment of a receiver to take away from the water company its current revenues, which are necessary to meet its current obligations, when the city would in no event be entitled to that revenue before final settlement and payment by the city of the value of the works. This fact makes it unnecessary to consider the point made by the water company that a receivership in fact destroys the business and rights of a corporation, contrary to the statute. It is to be observed that the rights of the city, under any view of the proper basis for a final settlement, will be adequately preserved. It is not necessary to here determine what the basis of that final settlement should be; but if it should be finally held that the city should pay the value of the property at the end of the 30 years, with legal interest thereon until the time of payment, and that the water company should account for the intermediate profits, still, upon the estimate of the value of the property made by the city itself, it would be amply protected, even though the settlement be not made, as it should be made, within a reasonably short period.

In accordance with the foregoing views, the orders appealed from in L. A. 657 and L. A. 658 are, and each of them is, hereby affirmed. In L. A. 655 the order appointing a receiver and enjoining the water companies from collecting the water rates, and from appropriating the water rates already collected, is reversed; and in L. A. 656 the order refusing to appoint a receiver to take actual possession and to manage and control the property, appealed from by the city, is affirmed.

We concur: GAROUTTE, J.; HENSHAW, J.; HARRISON, J.; TEMPLE, J.

KEMPSTER

v.

CITY OF MILWAUKEE.

(*Supreme Court of Wisconsin, June 2, 1899.*)

Torts of Officers—Liability of City.*—A municipality is not liable for the tort of its common council in maliciously encouraging the prosecution of its health commissioner for alleged misconduct in office, as in carrying out the laws for the preservation of the public health a municipality is performing a duty which it owes to the whole public as distinguished from a mere corporate duty.

APPEAL by plaintiff from Milwaukee county superior court. *Affirmed.*

V. W. Seeley, for appellant.

Carl Runge and *L. W. Halsey*, for respondent.

WINSLOW, J. This is an appeal from an order sustaining a demurrer to the complaint. The complaint alleges, in substance: That the plaintiff was the duly elected and qualified commissioner of health of the city of Milwaukee, and that in October, 1894, while a smallpox epidemic was raging in said city, and the plaintiff was performing his duty in trying to check the same, 34 charges of misconduct in office were willfully and maliciously preferred against him by private parties to the council, for the sole purpose of harassing the plaintiff, and causing him to abdicate his office; and that the council thereupon, for the sole purpose of harassing and embarrassing the plaintiff, and putting him to expense and annoyance, appointed a committee to investigate the charges; and that afterwards the council, upon a report of such committee, adopted a resolution declaring nine of the charges sustained, and dismissing the plaintiff from office. That

*See *note*, 1 Mun. Corp. Cas. 41, and Hoggard *et ux. v.* Mayor, etc., of Monroe, 1 Mun. Corp. Cas. 660, and *note* 665.

upon *certiorari* the removal proceedings were reversed by the circuit court of Milwaukee county, and the plaintiff was reinstated in his office. That by reason of the council's taking cognizance of the said charges, and compelling the plaintiff to defend his office and official acts for the public good, he was put to great expense in procuring the services of attorneys. And he prays to recover of the city the amount of the bills for attorney's services so incurred. It is quite apparent that this complaint states no cause of action against the city. In carrying out the laws for the preservation of the public health the city is performing a duty which it owes to the whole public as distinguished from a mere corporate duty. It is a duty which it is bound to see performed in pursuance of law as one of the governmental agencies, but not a duty from which it derives special benefit or pecuniary advantage in its corporate or private capacity. It is like the administration of the fire and police departments. Hayes *v.* City of Oshkosh, 33 Wis. 314; Kuehn *v.* City of Milwaukee, 92 Wis. 263, 65 N. W. 1030; 2 Dill. Mun. Corp. (4th Ed.) § 977. It is well settled that a city may indemnify its officers against liabilities incurred in the discharge of their duties where the city had a right to defend, or had a pecuniary or corporate interest in the discharge of, such duty, but not where the officer was acting simply as an official performing a public service, such as the preservation of public order or the conserving of the public health. Mechem, Pub. Off. § 879; 1 Beach, Pub. Corp. § 648; Lawrence *v.* McAlvin, 109 Mass. 311. If the city cannot legally agree to indemnify such officer, it plainly cannot be liable without agreement. If the common council was guilty of an actionable tort in maliciously encouraging the prosecution of the plaintiff, its members must answer therefor in their individual capacity; there would be no corporate liability. Uren *v.* Walsh, 57 Wis. 98, 14 N. W. 902; Robinson *v.* Rohr, 73 Wis. 436, 40 N. W. 658. Order affirmed.

CRAIG

v.

CITY OF CHARLESTON.

(*Supreme Court of Illinois, June 17, 1899.*)

Assaults by Policemen—Liability of Municipalities.*—A municipality cannot be held liable for assaults committed by its policemen while in the discharge of their duties.

Police Powers—Torts of Officers.—A municipality cannot be held liable for the consequences of the act of its mayor in knowingly placing on its police force a dangerous and vicious character.

Whether Policemen Can Be Obstructions.—A policeman, in the abuse of his authority, cannot, in the legal sense, be an obstruction in a street.

APPEAL by plaintiff from Third district appellate court. *Affirmed.*

James W. Craig, for appellant.
W. E. Adams and *Neal & Wiley*, for appellee.

PER CURIAM. In affirming the judgment of the circuit court for costs and sustaining the demurrer to the plaintiff's declaration, the following opinion, delivered by MR. JUSTICE HARKER, was rendered by the appellate court: Case Stated.

"The sufficiency of the declaration is the only question for our consideration. Stripped of their surplusage, the material averments of fact are that the city of Charleston, on an occasion when a large crowd of people had congregated in the city, appointed one John Apgar as an officer to prevent the obstruction of the streets by vehicles or otherwise, and placed him in control of one of the streets; that Apgar was a dangerous and violent man, and possessed an ungovernable

*See note at end of case.

temper and vicious disposition, which facts were known, or by the exercise of reasonable diligence could have been known, to the appointing officer; that Apgar, while in charge of the street and under pretense of discharging his duty, made a brutal and unjustifiable assault upon the plaintiff with a stick, whereby the plaintiff lost one of his eyes, and was otherwise injured. The duties devolving upon Apgar by virtue of his appointment were police duties. He was what is sometimes aptly termed a 'special policeman,' authorized to perform certain specific acts. It is a familiar rule of law, supported by a long line of well-considered cases, that a city, in the performance of its police regulations, cannot commit a wrong through its officers in such a way as to render it liable for tort.

Assault by Policemen—Liability of Municipalities.

"It is contended, however, that appellant does not base his right of recovery against the city upon the wrongful act of Apgar, merely, but upon the wrongful act of the mayor in appointing such a man as Apgar, when he knew, or should have known, of his dangerous and vicious character. The same principle which absolves the city from liability for Apgar's tortious act applies to the act of the mayor. The mayor was simply exercising a discretion vested in him by virtue of his office and the laws of the state. If the appointment was a wrongful act, which resulted in injury to the appellant, the burdens of liability cannot be cast upon the inhabitants and taxpayers of the city. A municipal corporation, while simply exercising its police powers, is not liable for the acts of its officers in the violation of the laws of the state and in excess of the legal powers of the city. Dill. Mun. Corp. §§ 950, 968; Town of Odell *v.* Schroeder, 58 Ill. 353; City of Chicago *v.* Turner, 80 Ill. 419; Wilcox *v.* City of Chicago, 107 Ill. 334; Blake *v.* City of Pontiac, 49 Ill. App. 543.

Police Powers—Torts of Officers.

"Appellant further contends that the placing of Apgar in

Note

the street and in control of it was the creation of a nuisance, upon which ground it is liable,—in fact, his chief contention is that he became thereby an obstruction in the street,—and cites a long list of authorities in support of the proposition that it is the duty of a city to keep its streets free from obstructions, and a failure in that regard will render it liable for injuries caused thereby. We cannot regard a human being, in the exercise of police powers, as an obstruction, in the sense contemplated by the unquestioned doctrine announced by those cases. We think the court properly sustained the demurrer to the declaration."

Whether Policemen Can Be Obstructions.

After a careful consideration of the case, we have reached the same conclusion as that arrived at by the courts below; and, concurring in the views of the appellate court, we see no necessity for another opinion on this appeal, but adopt the one above set out as the opinion of this court in the case. The judgment of the appellate court is affirmed. Judgment affirmed.

NOTE.

Torts of Police Officers—Liability of Municipality.—A municipality is not liable for the torts of police officers, done in and about the performance of their police duty.

United States.—Bowditch *v.* Boston, 101 U. S. 16; Grumline *v.* Washington, 2 MacArth. (D. C.) 578.

Alabama.—Dargan *v.* Mobile, 31 Ala. 469.

Georgia.—Attaway *v.* Cartersville, 68 Ga. 740; Harris *v.* Atlanta, 62 Ga. 290; McElroy *v.* Albany, 65 Ga. 387; Cook *v.* Macon, 54 Ga. 460.

Illinois.—Kolb *v.* O'Brien, 86 Ill. 210; Odell *v.* Schroeder, 58 Ill. 353.

Indiana.—Lafayette *v.* Timberlake, 88 Ind. 330.

Iowa.—Ogg *v.* Lansing, 35 Iowa 495; Caldwell *v.* Boone, 51 Iowa 687.

Kentucky.—Pollock's Adm'r *v.* Louisville, 13 Bush (Ky.) 221; Greenwood *v.* Louisville, 13 Bush (Ky.) 226; Prather *v.* Lexington, 13 B. Mon. (Ky.) 559.

City of Grand Haven *v.* Grand Haven Waterworks

Louisiana.—Stewart *v.* New Orleans, 9 La. Ann. 461 (*contra*, Wilde *v.* New Orleans, 19 La. Ann. 15).

Maine.—Cobb *v.* Portland, 55 Me. 381.

Maryland.—Atwater *v.* Baltimore, 31 Md. 462.

Massachusetts.—Buttrick *v.* Lowell, 1 Allen 172; Kimball *v.* Boston, 1 Allen 417; Hafford *v.* New Bedford, 16 Gray 297.

Mississippi.—Sutton *v.* Board of Police, 41 Miss. 236.

Missouri.—Worley *v.* Columbia, 88 Mo. 106.

Pennsylvania.—Norristown *v.* Fitzpatrick, 94 Pa. St. 121; Elliott *v.* Philadelphia, 75 Pa. St. 347.

Texas.—Corsicana *v.* White, 57 Tex. 382.

Virginia.—Richmond *v.* Long's Adm'rs, 17 Gratt. (Va.) 375; Burch *v.* Hardwicke, 30 Gratt. (Va.) 24; Harman *v.* Lynchburg, 33 Gratt. (Va.) 37.

Wisconsin.—Schultz *v.* Milwaukee, 49 Wis. 254; Little *v.* Madison, 49 Wis. 605.

CITY OF GRAND HAVEN

v.

GRAND HAVEN WATERWORKS.

(*Supreme Court of Michigan, April 18, 1899.*)

Use of Hydrants for Fire Purposes—Amount Recoverable.—Where a city has rightfully rescinded its contract with a water company because of the latter's failure to comply with its terms, and it has been determined equitable to pay the company for whatever use had been made of its hydrants for fire purposes, the company should be allowed an amount equal to the expense saved by the city through the use of the hydrants; and such amount should include interest, and loss from depreciation which would have been sustained by the city had it been using its own hydrants.

Taxation—Water Mains.*—In the absence of statutory authority a city cannot tax the underground pipes of a water company as personal property.

APPEAL by defendant from Ottawa county circuit court in chancery. *Modified.*

Andrew Howell, for appellant.

George A. Farr, for appellee.

*See note at end of case.

City of Grand Haven *v.* Grand Haven Waterworks

MONTGOMERY, J. This case was before the court at the October term of 1893, and a decision rendered, which is reported in 99 Mich. 106, 57 N. W. 1075. The relations of the parties are fully stated in the opinion of MR. JUSTICE LONG. It is there determined that the defendant had failed to comply with the terms of its contract, and that the complainant had exercised its right to rescind. The case was remanded to the court below for an accounting for the use of hydrants; it having been determined that it was equitable that it should pay for whatever use had been made of the hydrants for fire purposes. This accounting has been had, and from a decree fixing the allowance to the defendant at the sum of $1,500 the defendant appeals, claiming that the allowance is inadequate.

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We have found difficulty in fixing a basis upon which to base an estimate of the value of the services which the defendant rendered to the city. The circuit judge found the same difficulty, and could find no other basis than to estimate the actual number of gallons actually furnished by defendant for use at fires; and, estimating the price of this water at 50 cents per 1,000 gallons, he reached the result stated. There is apparently some injustice in this basis of computation, for the reason that the cost of maintaining pressure for fire purposes is greater than the cost of maintaining pressure for the ordinary domestic uses of water, and for the further reason that the computation leaves out of the account the occasions when, upon notice of fires, extra pressure is provided for, at expense to defendant, although no water at all is thrown. If this apparent injustice can be avoided in any way by the use of any data appearing in the record, we feel that it should be done. If, however, as is contended by the complainant, no such data appear, we are powerless to relieve the defendant. Taking as a starting point the date of October 24, 1884, when the first fire occurred, down to the fall of 1897, when the city commenced to extend its own

Use of Hydrants for Fire Purposes —Amount Recoverable.

waterworks, during this period the city had an inadequate plant for fire protection,—worth, as testified by the witnesses, about $6,000. The deficiency of the city's plant was supplied by the defendant, substantially. It appears by the testimony of an expert called by the complainant that the cost of a plant which would furnish adequate fire protection would be about $20,000. It would appear, therefore, that the city was saved the interest and depreciation on $14,000, which, at the rate of 8 per cent., would amount to $1,120 per year. We do not overlook the testimony that the city had two steamers, but we do not gather from the record that they were used during this time. This condition continued for three years, when the city expended an additional $10,000. Upon the same basis for the following year, 1897–98, the saving to the city by the presence of the defendant's plant was $320. In the fall of 1888 the city expended a further sum of $6,000, so that from this time on another basis must be adopted. After this date, we discover no safer basis than that adopted by the learned circuit judge, *viz.* to base the allowance on the amount of water actually furnished; for, while we recognize that this may not adequately compensate the defendant, we have no better data upon which to base a decree. The cost to the defendant cannot be the criterion, for the reason that the defendant cannot profit by its own default, or subject the complainant to added expense by reason of its failure to live up to its contract. Upon this basis, the number of gallons used after this date was, substantially, 608,000, at the price adopted by the circuit judge amounting to $304, which, added to the amount previously allowed ($4,680), makes a total allowance of $4,984 to defendant.

A claim is made for water furnished the public schools of the city, but we discover no such claim set up in the answer, and cannot consider it.

The city claims, as a set-off, certain taxes assessed against the defendant. The taxes on the real estate would appear to

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have been satisfied by a sale to the state. As to the personal property tax, the evidence shows that an assessment was made of pipes in the ground, as personal property, in wards in which the company had no abiding place. It would seem that there was, prior to 1893, no authority to assess these fixtures as personal property. *In re* Des Moines Water Co., 48 Iowa, 331; Com. *v.* Lowell Gaslight Co., 12 Allen, 75; Gas. Co. *v.* Thurber, 2 R. I. 15. In 1893 this rule was changed by statute (Pub. Acts 1893, p. 357). The taxes in question were levied before this act took effect, and the assessment was made without jurisdiction.

Taxation—Water Mains.

The decree will be modified by allowing to defendant for the use of hydrants the sum of $4,984. The complainant will be permitted to offset the costs on the original hearing in this court, and the costs of the first hearing in the circuit, and the defendant will recover costs of this hearing in this court. The other justices concurred.

NOTE.

Water Companies—Taxation—Pipes and Mains.—A water or gas company's pipes and mains which are laid in the streets are not taxable as personal property, but as real estate. *In re* Des Moines Water Co., 48 Iowa 324; Capital City Gas Light Co. *v.* Charter Oak Ins. Co., 51 Iowa 32; Oskaloosa Water Co. *v.* Board, 84 Iowa 407; Monroe Water Co. *v.* Frenchtown Tp. (Mich.), 57 N. W. 268; State *v.* Berry, 52 N. J. L. 308, 29 Am. & Eng. Corp. Cas. 586, *affirmed* 33 Am. & Eng. Corp. Cas. 64; Tide-Water Pipe Line Co. *v.* Berry, 53 N. J. L. 212; People *v.* Martin, 48 Hun (N. Y.), 193; Willard *v.* Pike, 59 Vt. 202; Inhabitants of Paris *v.* Norway Water Co., 85 Me. 330, 43 Am. & Eng. Corp. Cas. 501, in which case the court said:

"The proper classification, under the rules of the common law, of this species of property, is not a new question. It has been many times considered in England during the last century; and water-mains and underground conduits have there been considered as fixed to, included in, and a part of the soil. They have been considered real estate, and have uniformly been held locally taxable as such to the 'occupiers of lands,' under the statute of 43 Eliz., or, as our

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statute puts it, 'to the person in possession thereof.'" King *v.* Mayor, etc., of Bath, 14 East, 610; King *v.* Water-works, 1 Maule & S. 634; King *v.* Gas-light & Coke Co., 5 Barn. & C. 466.

Under the statute of 38 Geo. III., laying taxes upon the owners of "lands and hereditaments," the pipes of a water company in a street were held to be not taxable as land to the owners of them. LORD CAMPBELL says: "The right in question, where exercised, appears to us to be in the nature of an easement, and neither land nor hereditament. The right is to convey water through the land of another; and whether the water is to be conveyed upon the surface of the ground, or in covered drains, or in pipes, appears to us, for this purpose, to be immaterial. The mere power to lay the pipes in land cannot be considered land or hereditaments; nor do we think that the pipes, when laid, can be so considered, within the meaning of the Land-tax Acts. * * * The company are not the owners of the land where the pipes lie, nor are they the tenants of the land. * * * The moment the company take up their pipes which had been laid under the streets of any particular parish, all pretence for saying that they have or held land in the parish would be gone; but after the pipes are removed, all the land in the parish would remain, and it would be had and be held as before. * * * But 'land,' like the word 'inhabitant,' which likewise occurs in 43 Eliz. c. 2, has various meanings; and it may, in that statute, passed to throw a charge upon the occupier, mean the ground on which a chattel is deposited in the exercise of an easement, although, in other acts of Parliament, it means a legal interest in the soil. This is the meaning which we think it bears in the Land-tax Acts." Water-works *v.* Bowley, 17 Q. B. 353.

The city of Providence laid a tax on the pipes of the gas company in the streets, as real estate, under a statute authorizing such a tax against those "who hold or occupy the same," and it was held a valid tax, like those laid under the statute of Elizabeth. Gas Co. *v.* Thurber, 2 R. I. 15.

So a pipe-line laid through the soil of New Jersey, under grants from the owners of the fee, is not only real estate, when considered as a part of the fee, but is held, for the purposes of taxation, to be real estate of the company owning it, under a statute defining "real estate" as including all lands, and all buildings or erections thereon or affixed thereto. Pipe-line Co. *v.* Berry, 52 N. J. Law, 308, 29 Am. & Eng. Corp. Cas. 586 (*affirmed*, 33 Am. & Eng. Corp. Cas. 64).

Gas mains and pipes are sometimes distinguished, from the class of property now under consideration, as apparatus for the delivery of the manufactured article, and are considered machines or chattels. Com. *v.* Gas-light Co., 12 Allen, 75; Memphis Gas-light Co.

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v. State, 6 Cold. 310. Water-pipes, etc., are not machinery. Dudley *v.* Aqueduct Corp., 100 Mass. 183.

The public has an easement in land, over which streets and roads are laid, coextensive with the necessities of public use. No title in the soil is acquired thereby, and when the ways are discontinued the easement is extinguished. Private corporations, like gas companies, water companies, and street-railway companies, by legislative authority, are sometimes allowed the use of the public easement to serve the necessary demands of society, and without any additional compensation to the owner of the soil. Such companies, therefore, by the public license accorded them, take no title in the land. They are simply allowed to use it for the public convenience as a counterbalancing consideration for their expenditures, giving opportunities to gather tolls from its use. In using the street or road, they place their pipes or rails in or upon the ground, there permanently to remain. They occupy land with appliances that become valuable for the revenue they yield. These appliances are fixed, permanent, used in connection with the soil that supports and sustains them. When considered as the property of their respective companies, they are not land within the common-law rule. But, when considered as if owned by the same person who has title to the soil, they may properly enough be so considered. Suppose the street, with these appliances in it, be discontinued, and they be abandoned without removal and pass to the owner of the soil, who should then lease them, in gross or singly, to tenants or persons desiring to operate them. Would they not be real estate, when considered with the property as a whole? Would they not pass by a deed of the land? Why, then, may they not properly enough be assessed as real estate, and to the person in possession of them? Their value as chattels would be nominal. Water-pipes buried in the ground as chattels would be of little or no value. It is the use that gives them value, and that use is strictly of a fixture—a permanent appliance. As bearing upon this view, see Water Co. *v.* Lynn, 147 Mass. 31; City of Fall River *v.* Bristol, 125 Mass. 567; People *v.* Cassity, 46 N. Y. 46.

CITY OF NEWPORT *et al.*

v.

COMMONWEALTH.

(*Court of Appeals of Kentucky, April 26, 1899.*)

Pleading—Parties—Amendments.—Suit was brought against the Newport Waterworks to recover a tax upon its franchise. The allegation that it was a corporation having been denied in the answer, the commonwealth amended its petition, making the city of Newport a party defendant, alleging that it owned and operated the Newport Waterworks as an ordinary water company. The city objected to the filing of the amended petition, on the ground that there was not and never had been any such defendant or corporation as the Newport Waterworks. This objection and a demurrer to the petition having been overruled, the city pleaded to the merits. *Held*, that the amendment and the original petition could be considered as an original petition against the city.

Taxation—Exemptions—Constitutional Law.—In such action, it was contended that the imposition of a franchise tax was in violation of the state and federal constitutions, for the reason that, at the time of the issuance of bonds for the purpose of building the waterworks, there was no franchise tax authorized to be collected from the city on account of the waterworks system. *Held*, that the contention was without merit, as the bondholders were not parties to the action, and the fact that no tax was levied on the property at the time of its acquisition could not prevent the imposition of a tax thereon in subsequent years.

City Waterworks—Whether City Liable to Franchise Tax.*—A city would not be taxable on a franchise to operate waterworks for governmental purposes only, such as extinguishing fires, street cleaning, and the like; but where such a franchise is not granted to the city as necessary to carrying on the municipal government as a political power, but merely as a private corporation for the convenience or profit of its citizens, the franchise is not only taxable by the state, but not to be constitutionally exempted from taxation.

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*See note at end of case.

City of Newport *v.* Commonwealth

Taxation—Res Adjudicata.—It would be against public policy to hold that a judgment of a circuit court on a question of taxation is forever binding on the supreme court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the commonwealth failed to bring the question to the supreme court.

APPEAL by defendants from Franklin county circuit court. *Affirmed.*

Horace W. Root, for appellants.

W. S. Taylor and *M. H. Thatcher*, for the Commonwealth.

DU RELLE, J. The secretary of the Newport Waterworks made a verified statement, as required by section 4078, Ky. St., in order for the board of valuation and assessment to determine the value of its franchise for taxation for the year 1894, upon which statement that board proceeded to value and assess the corporate franchise of the Newport Waterworks. Suit was brought in the Franklin circuit court for the taxes of that year, alleging that the Newport Waterworks was a corporation, having and exercising privileges and franchises not allowed by law to natural persons. Summons having been served upon the president and chief officer of the board of waterworks trustees, there were filed a demurrer, a special demurrer for want of jurisdiction of the defendant, the Newport Waterworks, and an answer, in which the Newport Waterworks alleged that there did not and never had existed a corporation of that name, and denied that it was a corporation, or was organized or doing business as such. A few days after the filing of these pleadings, and before they were acted upon, the commonwealth amended its petition, making the city of Newport a party defendant, alleging that it was a municipal corporation, a city of the second class; that it owned and operated the Newport Waterworks; that, by the terms of its charter, it was authorized to, and did, own and operate the waterworks, and charge tariff rates for water, as other companies; that the waterworks were not used by the city for

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governmental purposes, but as a private enterprise, the accounts thereof being kept distinct and independent of the governmental affairs of the city, all citizens who used the water being charged the regular tariff rate; that the city, so far as the waterworks and waterworks property were concerned, was engaged in the business of an ordinary water company, operating the works for profit; that, while not a corporation, the Newport Waterworks was used and operated as a water company, and had a secretary, duly elected by the city of Newport, the owner of the property, and duly selected as such secretary by the commissioners of the waterworks, who had theretofore been selected as such commissioners by the city, as provided in its charter; and that by said secretary the report to the board of valuation and assessment was made. Subsequently, the city entered its objection to the filing of the amended petition, and moved to set aside the filing, on the ground that neither at the time of the institution of the action, nor before, nor since was there any such defendant or corporation as the Newport Waterworks, and, therefore, there was no action commenced, or in being, to which the amendment could be made. This objection, and the demurrer to the petition, were overruled, and a judgment rendered, which was afterwards, by agreement, set aside, and an answer filed by the city of Newport pleading to the merits. An agreed statement of facts was filed, the case submitted, and judgment rendered against the city for the tax.

It is first urged that it was error to permit the amended petition to be filed, making the city of Newport a party defendant, upon the ground that there was no action pending against any natural or artificial person, and, therefore, nothing to be amended; that an amendment presupposes a real action or proceeding already pending in court; that, in this case, there was nothing to which an amendment could go, because there was no petition stating, or attempting to state, a cause of action against any real person, natural or artificial; and that

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the original petition was a nullity. It is further urged that this case is not one of misnomer, or of a suit against a real person by a wrong name, or against one person erroneously sued under the name of another,—in which cases it seems to be conceded that an amendment might be made, under the authority of section 134 of the Civil Code of Practice, and the cases of Heckman's Adm'r *v.* Railroad Co., 85 Ky. 631, 4 S. W. 342, and Railroad Co. *v.* Hall, 12 Bush, 131. Upon the other hand, it is urged on behalf of the commonwealth that as the city, by its own officers, caused the report for franchise tax to be made in the name of the Newport Waterworks, and the waterworks were distinct in management from the city government, being controlled by commissioners selected by the city, and by whom water rates were fixed, the waterworks were, in effect, a *quasi* corporation, or a company or association, within the meaning of sections 4077, 4078, Ky. St. But, without going into that question, it seems to us that the amendment and the original petition may be considered together as an original petition against the city of Newport, to which the city entered its appearance without reservation. Nor does the case of Houston *v.* Kidwell (Ky.) 14 S. W. 377, cited by counsel for appellant, seem to us to be in conflict with this view. That was an action for a new trial. The petition was erroneously dismissed. Afterwards, an amended petition was filed alleging the discovery of additional evidence, but which was merely cumulative. The judgment dismissing the original petition was not appealed from, and it was held that the amended petition could not be treated as a petition, for the reason that the relief sought was *res adjudicata* by the final judgment on the first petition, from which no appeal had been taken. Nor does the citation from Newm. Pl. & Prac. p. 288, apply. That refers to a case where the wrong person brings an action for a liability existing, but existing in favor of another person than the plaintiff. And, while it is there said that "the foregoing rules apply, for the most part, equally to a mistake in the name of the defendant as of the plaintiff," that does not

apply to a case like this, where the original petition is good upon its face, but a mistake has been made in the name of the party upon whom the liability rests, as the owner of specific, described property. In such case, there would seem to be little difference whether the owner was sued originally by the name of another existing person (as in the Heckman's Adm'r and Hall Cases, *supra*) or was sued by the name of a nonexistent person. The question whether the city might have taken advantage of the mistake by special entry of its appearance and dilatory pleading is not here presented, as it appeared without reservation. The answer presents several defenses: First. That the city was authorized, by act of the legislature, to build and operate a waterworks system, and has built such system, and operates it through a board styled the "Commissioners of Waterworks," having issued $800,000 of bonds, $708,000 of which are still outstanding; that it exercises no right or privilege with respect to its waterworks which a natural person might not do; that its waterworks are situated within its corporate limits, or upon its own land outside the limits; that the report made by the secretary of that board was erroneous; that, including the interest upon the bonded debt created to build and operate the waterworks, the expense of operation was more than $35,000 in excess of the actual receipts; that the waterworks department of the city is not a paying institution, and its actual receipts in any year since the act authorizing it to be built have not been sufficient to meet both its operating expenses and the interest upon the bonds issued to build it, but that the city, by the annual levy and collection of a tax, meets and pays off the interest and bonds of the waterworks falling due in each year; that it will not be self-sustaining for many years to come; and that its tangible property used in connection with the waterworks system was, in the year 1894 and subsequent years, assessed by the state for taxation, and taxes thereon paid. Second. That the city exercises no special or exclusive privileges or franchises not allowed by law to natural persons, with

respect to its waterworks; that the works are used for governmental purposes, and not as a private enterprise; that the accounts of the waterworks are not kept distinct and independent of the governmental affairs of the city; that it is not engaged in the business of an ordinary water company, and that the waterworks are not a private enterprise, operated for profit. Third. That, by an act adopted March 8, 1878, it was provided that the waterworks should be exempt from county and state taxation so long as it should be unproductive; and that it has been unproductive since its establishment. Fourth. That the imposition of a franchise tax is in violation of the state constitution, and also in violation of subsection 1, § 10, art. 1 of the federal constitution, prohibiting the passage of a law impairing the obligation of contracts, for the reason that, at the time of the issuance of the bonds, there was no franchise tax authorized to be collected from the city on account of the waterworks system, and the bondholders have a vested right to the bonds free from such a tax. Fifth. That the liability of the city to a franchise tax is *res adjudicata*, by a judgment rendered in a suit by the commonwealth against the Newport Waterworks and the city of Newport for a franchise tax, on account of the city's ownership and operation of the waterworks, for the year 1893, under the same law under which the present action was instituted; the subject-matter of that suit being identical with the subject-matter of the case at bar, except that in that action the suit was to collect the tax for the year 1893, and the present suit is for the year 1894. As to the fourth ground, it is sufficient to say that the bondholders were not parties to this proceeding, and that, so far as we are informed, it has never been held that the fact that no tax was levied upon the property at the time of its acquisition had the effect to prevent the imposition of a tax thereon in subsequent years. The claim of exemption under the act of 1878 cannot be sustained, as it is not claimed that any contract right

Taxation—Exemptions—Constitutional Law.

existed thereunder, and the exemption thereby given is repealed by the present constitution.

City Waterworks —Whether City Liable to Franchise Tax.

The first and second defenses present the question, in substance, whether a municipal corporation can be subject to a franchise tax. It seems, under the case of City of Owensboro *v.* Com. (Ky.) 49 S. W. 320, that the waterworks might be exempt from taxation as public property used for public purposes, under section 170 of the constitution, if operated solely for the purpose of extinguishing fires, cleaning the streets, and the like, which, under the opinion in that case, would be deemed governmental purposes; and that, if the tangible property held and used for that purpose would not be taxable, neither would the city be taxable on a franchise to so operate and use it. Is the case altered by the fact that the city, while operating the waterworks for the convenience of its people, makes a charge against them for furnishing them with water? In the case of Com. *v.* Makibben, 90 Ky. 384, 14 S. W. 372, it was held by this court that the power granted to the city of Newport to operate its waterworks was not granted as necessary to carrying on its municipal government as a political power, but merely as a private corporation for the convenience or profit of its citizens, and, therefore, not only taxable by the commonwealth, but not to be constitutionally exempted from taxation. Said the court, through JUDGE BENNETT: "But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property necessary to carrying on its municipal government as a political power is not subject to state taxation. But, if it is not necessary for such purpose, then it must be treated as the property of a private corporation, and is subject to state taxation, unless it is expressly exempted in consideration of public services,"—referring to City of Louisville *v.* Com., 1 Duv. 298, and Barbour *v.* Board, 82 Ky. 649. In the same opinion, the court quoted,

with approval, as follows, from Bailey *v.* City of New York, 3 Hill, 531, in which case it was decided that the city, in erecting waterworks, acted in its private, not public, character: "But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purposes of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom a like special privilege had been conferred." So, in City of Covington *v.* Com., 39 S. W. 836, it was held, in an opinion by CHIEF JUSTICE LEWIS, that the waterworks of the city of Covington could not, under the constitution, be exempted by special statute from taxation,—referring to Clark *v.* Water Co., 90 Ky. 515, 14 S. W. 502, in which the same question was decided. It seems, therefore, to be well settled that the tangible property used for waterworks purposes is subject to taxation; and that the municipality, as to it, occupies the position of, and is to be treated as, a private corporation. Section 4077, Ky. St., which requires a franchise tax to be paid by certain enumerated companies, includes water companies in the list of companies required to pay such tax, and also requires such tax to be paid by "every other like company, corporation or association." And section 4082, *Id.*, provides that: "Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this state engage in the business of any of the corporations named in the first section of this article (section 4077), then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and

treated as the capital stock of such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation." The three sections (4077, 4078, and 4082), taken together, clearly indicate the intent of the legislature that no corporation, company, association, person, or aggregation of persons should be permitted to engage in any of the businesses enumerated in section 4077, without thereby being required to make report to the board of valuation and assessment, and becoming subject to the so-called franchise tax. Under the doctrine laid down in the cases referred to, the municipality occupies, as to its waterworks, the same position as would a private corporation owning such works. It follows, inevitably, therefore, from that doctrine, that not only is the tangible property used by the city for waterworks purposes taxable by the commonwealth as nonmunicipal and private property, but that, as to that property, it is subject to a franchise tax, and must make report therefor, as required in section 4078.

The only question remaining for decision is upon the plea of *res adjudicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893 and the present action was attempting to collect a tax for the year 1894; that said action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition. A copy of the judgment was filed as part of the answer, and it was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive. The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another

Taxation—Res Adjudicata.

promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay; and the right to litigate the legality of a tax upon all grounds must, of necessity, exist, regardless of former adjudications as to the validity of a different tax. In Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 314, 14 Sup. Ct. 597, the supreme court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in Cromwell *v.* Sac Co., 94 U. S. 357. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered. * * * The same principle was reaffirmed in Nesbet *v.* Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, and in Railroad Co. *v.* Alsbrook, 146 U. S. 279, 302, 13 Sup. Ct. 72. In the case of City of Davenport *v.* Chicago, R. I. & P. R. Co., 38 Iowa, 633, 640, the supreme court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the state from collecting the taxes for a subsequent year; each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes, of action (as, two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. * * * Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be

of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the state should be forever barred in the collection of taxes by an erroneous decision." 146 U. S. 314-316, 13 Sup. Ct. 105, 106. In Lake Shore & M. S. Ry. Co. *v.* People, 46 Mich. 208, 9 N. W. 249, a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res adjudicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. Said CHIEF JUSTICE MARSTON, delivering the opinion: "The decree in the Wayne circuit would not prevent the state from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance, except as a precedent. In this case, it is not conclusive. Such was the view of MR. JUSTICE CAMPBELL upon a similar question in the case in 9 Mich. 448 (Michigan Southern & N. I. R. Co. *v.* Auditor-General), already referred to; and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound, in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause, but one arising since then, and the state is not in this case seeking to recover any portion of the taxes the collection of which was restrained in that case." We do not think the plea of *res adjudicata* avails in this case. As stated in 21 Am. & Eng. Enc. Law, p. 227, the rule is: "To make a matter *res adjudicata* there must be a concurrence of the four conditions following, namely: First, identity of the subject-

matter; second, identity of cause of action; third, identity of persons and parties; fourth, identity in the quality of the persons for or against whom claim is made." The taxes for the subsequent year constitute a new cause of action, it may be, similar to the cause which was adjudicated, but a distinct and different cause. The rulings of the court upon the legal questions involved, if rendered by this court, are authority here, to the extent, and no further, that like decisions would be, in a suit between different parties. In our opinion, it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to the taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the commonwealth bound by the laches of its officer. The decision of the circuit court as to the taxes of 1893 is not binding upon this court as to the taxes for subseqnent years. It follows, therefore, that the judgment must be affirmed.

PAYNTER, J., dissenting.

NOTE.

Taxation—Exemption of Municipal Property.—In order that municipal property may be exempt from taxation it must be employed for governmental, and not commercial purposes. Erie County *v.* Erie Waterworks Comm'rs, 113 Pa. St. 368; West Hartford *v.* Board of Water Comm'rs, 44 Conn. 360; Wayland *v.* Middlesex County, 4 Gray (Mass.) 500; South Con. Meeting House *v.* Lowell, 1 Met. (Mass.) 538; Louisville *v.* Com., 1 Duv. (Ky.) 295, 85 Am. Dec. 624; Allegheny County *v.* McKeesport Diamond Market, 123 Pa. St. 164; Bailey *v.* New York, 3 Hill, 531; Lloyd *v.* New York, 5 N. Y. 369; Storrs *v.* Utica, 17 N. Y. 104; Commissioners *v.* Duckett, 20 Md. 468; Western S. F. Soc. *v.* Philadelphia, 31 Pa. St. 175. See also Athens City Waterworks Co. *v.* Athens, 74 Ga. 413.

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CARL *et al.*

(*Court of Appeals of Kentucky, April 29, 1899.*)

Exemption from Taxation—Outlying Property.*—The provisions of the present constitution of Kentucky requiring that taxes shall be uniform upon all property subject to taxation within the limits of the authority levying the tax, and prohibiting the exemption from taxation of any property except such as is exempt by the constitution, preclude the application of the old rule relieving outlying property from taxation for municipal purposes when it is in fact situated within the territorial limits of the city.

APPEAL by defendant from Pulaski county circuit court. *Reversed.*

O. H. Waddle and *J. P. Horniday*, for appellant.

G. W. Shadoan, for appellees.

HAZELRIGG, J. The judgment below perpetuates an injunction granted on behalf of appellees, property owners in the outer limits of the city of Somerset, for the reason that, while their property is situated within the boundary lines of the city, they do not receive a corresponding benefit from the taxation sought to be enforced by the city authorities. In the judgment the chancellor followed the rule under the old constitution as repeatedly announced by this court, and, while no change of this ruling growing out of the new constitution had been announced by this court when this case was heard below, it has been authoritatively determined by this court recently that the provisions of the new constitution requiring that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority

*See note at end of case.

levying the tax, and prohibiting the exemption from taxation of any property except such as is exempted by the constitution, preclude the application of the old rule relieving the outlying property from taxation when it is in fact situated within the territorial limits of the city. Board *v.* Scott (Ky.) 42 S. W. 104. It is true that the usual reason given for the prevalence of the old rule was that to tax for city purposes those living in the remote parts of the city whose lands had not been laid off into city lots, or used as city property, and who had scant, if any, police protection, would amount to a taking of private property for the public use without just compensation, and therefore a violation of section 14, art. 13, of the old constitution; and it is likewise true that the present constitution, no more than the old, permits this to be done. It would seem, therefore, to follow that, if the old rule was ever supported by a good reason, there would be the same reason for its application under the new as there was under the old constitution. But the old rule was never satisfactory, because impracticable. It seemed, in principle, to suggest a comparative basis for the taxation of property within the city, levying the greater tax on those more favorably located, and graduating the taxes of each taxpayer according to the benefits received. There was constant friction under the old system, and the courts were rarely without cases involving the question of taxation of outlying property. There are many reasons why such cases were rapidly multiplying, rather than diminishing, under the old rule. When, therefore, the provisions of the new constitution seemed to demand absolute uniformity of taxation within the territorial limits of the taxing authority, the courts seized the opportunity of changing the rule. And, moreover, the rule announced in the Scott Case is entirely just. It does not violate the principle that generally those getting the greatest benefit from the city government should pay the greatest tax. It is easy to see that, the fewer benefits received by any given property, the less will

be its value, and the less, therefore, will it be taxed. The judgment must be reversed for proceedings consistent herewith.

NOTE.

Municipal Corporations—Taxation of Land Not Benefited.—The above decision brings the court of Kentucky into line with the weight of authority. Linton *v.* Athens, 53 Ga. 588; Martin *v.* Dix, 52 Miss. 53; Kelly *v.* Pittsburgh, 85 Pa. St. 170; Municipality No. 3 *v.* Michaud, 6 La. Ann. 605; Allen *v.* St. Louis, 13 Mo. 400; Russell *v.* St. Louis, 9 Mo. 507; Lee *v.* Thomas, 49 Mo. 112; Walden *v.* Dudley, 49 Mo. 421; Giboney *v.* Cape Girardeau, 58 Mo. 141; Patterson *v.* McReynolds, 61 Mo. 203; Turner *v.* Althaus, 6 Neb. 54; Hurla *v.* Kansas City (Kan.), 38 Am. & Eng. Corp. Cas. 504; Davis *v.* Point Pleasant (W. Va.), 32 Am. & Eng. Corp. Cas. 666; Mendenhall *v.* Burton, 42 Kan. 570; Weeks *v.* Milwaukee, 10 Wis. 242; Cary *v.* Pekin, 88 Ill. 154; Hewitt's Appeal, 88 Pa. St. 55.

FAY *et al.*

v.

CITY OF SPRINGFIELD *et al.*

(*Circuit Court, S. D. Missouri, W. D., May 9, 1899.*)

Repaving Street—Local Assessments—Front-Foot Rule—Benefits—Right to Question*—Constitutionality of Statute.—The statute of Missouri (sections 1495, 1496, Rev. St. 1889) authorizing the apportionment of the costs of repaving a street in cities of the third class on blocks and lots abutting thereon according to the front foot, without regard to the question of fact whether or not the given parcel of land is benefited thereby to the extent of the assessment, and without affording the property owner an opportunity to question the existence of such benefit, is in contravention of the fourteenth amendment to the federal constitution, and is therefore void.

Same—Same—Same—Same.—The only theory of law under which the cost of such street improvements can be imposed as a special tax on the abutting property rather than as a burden upon the entire municipal community, being the fact that the local property is peculiarly benefited thereby, statutes or ordinances which arbi-

*See notes at end of case.

trarily assume that such local property is benefited in the proportion of the frontage thereof are invalid, unless the opportunity is afforded, at some period in the progress of assessment and the enforcement thereof, to be heard upon the question of fact as to whether or not the benefit is equal to the burden imposed, and as the supreme court of the state holds that, notwithstanding no notice or hearing is provided therefor when the tax is imposed by the city council, the owner when sued for the enforcement of the special tax cannot be heard to defend upon the ground that his property was not in fact benefited, nor upon the question as to whether the apportionment of the costs is equal among the several lot owners, the statute is violative of the fourteenth amendment of the federal constitution, and the whole tax may be enjoined. Following Village of Norwood *v.* Baker, 19 Sup. Ct. 187, 172 U. S. 269.

(Syllabus by the Court.)

James Baker, for complainants.

R. S. Goode, *Barbour & Daniels*, and *A. A. Johnson*, for defendants.

PHILIPS, District Judge. This is a bill in equity to enjoin the enforcement and collection of special tax bills assessed against lots fronting on Commercial street in the city of Springfield, Mo. The complainants are owners of certain of the lots; and the bill alleges, in substance, that the city of Springfield, which is a city of the third class, under the statutes of the state of Missouri, passed a resolution directing the repavement of said street from the center of Boonville street to the center of Benton avenue, embracing a number of blocks fronting on said street, and that it made a contract for said repaving with the defendant A. A. Myrick; and for the payment of the cost of this work the city provided by ordinance as follows:

Case Stated.

"That there is hereby levied and assessed a special tax against the lots and pieces of ground hereinafter described to pay for the construction of a brick pavement of Commercial street from the center of Boonville street to the center of Benton avenue, as provided by resolution No. 370, approved June 9, 1898. The assessments herein charged being apportioned among the several lots and pieces of ground made

liable therefor by the block, according to the front foot thereof, as follows."

The ordinance then set out a description of the lots thus assessed by the front foot, among which are the lots owned by the complainants severally. The aggregate amount of this work is $12,657, and tax certificates upon said assessment were issued to said Myrick by the city council against each of the owners of lots abutting on said street within the limits specified in said ordinance in proportion to the frontage of the lots. The bill alleges that the city assumes and claims that the statute under which it was incorporated confers upon it authority to so levy and collect said taxes, and all other taxes for local improvements heretofore levied by it based upon the number of front feet abutting on such improvement, without limit as to the amount thereof, and without reference as to the value of the property, or the betterment, if any, conferred upon the owner of the property by the improvements, and that the same is not in conflict with the constitution of the United States or of the state of Missouri. The bill alleges that while the city, in assessing said taxes, conformed to the provisions of the law under which it attempted to act, yet said act is in conflict with the constitution of the United States, especially the fifth and fourteenth amendments thereof. It is also averred that a part of the lots so taxed are well improved and of much greater value than others which have no improvement and are of but little comparative value. There are other averments contained in the bill which are not material to be recited. The bill prays for a decree declaring the act of the legislature under which the proceedings were had to be inoperative, for the reason that it is in conflict with the constitution of the United States and the amendments thereto, and that the tax so assessed thereunder be declared void, and the collection thereof perpetually enjoined. The bill is brought in behalf of the complainants and all other persons similarly affected by the attempted exercise of the power claimed. The cause is heard on an application

for a temporary injunction. The defendants have filed an answer to the bill, but not under oath.

I am unable to perceive why this case is not controlled by the ruling of the supreme court in Village of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187. The provision of the Ohio statute, on which that case depended, was similar, in legal effect, to the statute of Missouri and the ordinance of the city of Springfield, under which the assessments were made. The Ohio statute provided that, where an improvement of an existing street should be ordered and made, the expense thereof, when not assessed as a general tax to be paid by the municipality generally, "shall be assesssed by the council on the abutting and such adjacent and contiguous and other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made." The case decided by the supreme court, *supra*, was that of an assessment based upon the last clause above quoted, by the front foot of the property bounding and abutting upon the improvement. The Missouri statute under which this special tax was imposed (subsection 3, § 1495, Rev. St. Mo. 1889) provides that:

Repaving Street—Local Assessments—Front-Foot Rule—Benefits—Right to Question—Constitutionality of Statute.

"For paving, macadamizing, curbing and guttering all streets, avenues and alleys, and repairing same, and for doing all excavating and grading necessary for same, after said streets, avenues and alleys have first been brought to grade, * * * the assessment shall be made for each block separately, on all lots and pieces of ground on either side of such street or avenue, the distance improved or to be improved, or on lots or pieces of ground abutting on such alley, in proportion to the front foot."

Section 1496 then declares that:

"The assessments made in pursuance of the second and third clauses of the second subdivision of the preceding section shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax bill shall issue therefor, and be paid in the manner provided by ordinance. Said special tax may bear interest after thirty days from the date of issue and presentation of same at the rate of ten per cent. per annum; and every such special tax bill shall be a lien against the lot of ground described in the same until the same is paid."

While it is true that the Ohio statute differs from the Missouri statute, in that, in addition to the mode of assessment by the front foot, it gave to the council the power to apportion the cost of such improvement upon the abutting lot owners in proportion to the benefits resulting from the improvement, or according to the value of the property assessed, yet the city of Norwood did not see fit to pursue either of the last two methods. How this difference in the two statutes is to help the defendants is not apparent. It only shows that it was in the mind of the legislature of Ohio that the matter of apportionment of such burden could be predicated upon the basis of relative benefits bestowed upon the abutting property, or according to the relative value thereof; whereas the Missouri statute contains no such provision whatever respecting betterments, or the relative value of the property touched. On the contrary, the Missouri statute provides absolutely, independent of any consideration of benefits conferred upon the lot owner by the street improvement, and independent of any consideration of relative value of the property assessed, "that the assessment shall be made for each block separately on all lots and pieces of ground on either side of such street, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, in proportion to the front foot." The Ohio statute further provided, in case an apportionment of the costs was directed on the basis of benefits, a method in

advance of such assessment for ascertaining the benefits and apportioning the same. Section 2277, Rev. St. Ohio. But, as persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment, no method whatever is provided therefor; and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments, as a basis for the apportionment, was not contemplated or provided for. After passing the resolution that the work be done, the first section of the ordinance "levied an assessment and special tax against the lots; * * * the amounts herein charged being apportioned among the several lots and pieces of ground made liable therefor by the block, according to the front foot thereof." It is to be conceded that the courts of this state, while admitting that the only permissible theory under the fundamental law upon which a special tax for street improvements can be assessed against the property of the individual member of the municipal community is on the ground of special benefit conferred thereby not common to the whole community, yet they have maintained that this requirement is fully met by arbitrarily apportioning the cost of the improvement according to the front foot throughout the extent of the street. Without reviewing the cases in general, this has practically been recognized in a perfunctory way. This doctrine culminated in an opinion by JUDGE WAGNER in City of St. Louis *v.* Clemens, 49 Mo. 552. As the opinion shows, the court first ruled that, regardless of the completion of the contract along the whole line of the street to be improved, any one lot might be assessed for the cost of the work done on its immediate front, no matter if, instead of benefiting the lot, the work done practically ruined its value; thus fitly illustrating how intolerable the rule that would arbitrarily subject the private property of the citizen to the burden of public improvement when separated from the basal proposition of benefits bestowed equal to the burden imposed.

JUDGE WAGNER, when confronted with this dilemma, receded, and said:

"The property must bear its just burden to the whole work according to its frontage. Any other construction would be unequal and unjust, and contrary to the theory of supposed benefits which support and uphold these laws. Grading in front of a given piece of property may be a damage instead of a benefit, and it will not be presumed that the property holder should be obliged to pay for the whole work that causes his damage. The assessment should be made in the proportion which the whole frontage of any particular lot bears to the entire work."

After thus recognizing the foundation of the rule of special assessments, it seems to my mind to be irreconcilably contradictory to say that the requirement is fully met by an apportionment based solely upon the frontage of the lots on the street, without any regard whatever to the fact of whether or not the particular lot is benefited at all by the work done throughout the length of the street improved, and without any regard to the fact of whether or not the benefit bestowed is equal, as between all the lots fronting on the street. It is to be observed that the learned judge had just recognized the demand of justice that the particular lot should only bear its just proportion, and therefore an assessment which should be made for the cost of the work done in the immediate front of the lot might be ruinous rather than beneficial to it. This being unquestionably correct, exactly how this condition of the particular lot thus inconvenienced or left by the improvement could be changed into a benefit by completing the extension of the street throughout the distance covered by the contract is incomprehensible, as also why gross inequality might not continue to exist among the lots assessed after the completion of the work. The utmost that can be urged in favor of the front-foot rule, as applied to the case at bar, is, as has been suggested by counsel, that it is the policy of the state legislature on this subject, which rests for its support upon the bald assumption that reasonable

equality is attained by this method; that is to say, if the legislature should declare that the cost of opening and paving streets in cities of the third class shall be assessed upon one block most centrally situated along the line of the street, the act should stand, because it is the declared legislative policy of the state, and because, in the judgment of the legislature, the method reasonably approaches equality and justice. Statutes in this and other states, which provide that the cost of such improvement shall be assessed where the lots touch, according to their value, furnish more nearly a rule of equality, for they are based upon the underlying principle of the revenue laws of the state, which require every citizen to contribute towards the burdens of government according to the assessed value of his property, as that bears some reasonable relation to the quantum of protection or benefit his property receives. At all events, it is less instinct with inequality and injustice than the front-foot rule, which utterly ignores the relative benefits received by the several lots called upon to contribute.

The discussion in Barnes *v.* Dyer, 56 Vt. 469, cited in Village of Norwood Case, is quite pertinent to this contention of defendants. Under the act of the legislature under review in that case, the city council was authorized to assess the owners of abutting property for a street improvement "so much of the expense thereof as they shall deem just and equitable." The statute further provided for—what the Missouri statute does not—notice, hearing, and appeal. The constitutionality of this act was successfully attacked by the property owner sought to be taxed under it. The court held that the language "as they shall deem just and equitable" fixed no definite standard by which the rights of the taxpayer were to be protected, as it was impossible from the terms employed to know upon what theory the council proceeded in determining what was equitable and just, whether it was in view of benefits bestowed, or upon the value of the land, or personal convenience to the owner, or of his ability to pay,

or all combined. The court, after referring to JUDGE DILLON'S discussion of this question, said:

"The act in question makes no express allusion to the assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land especially benefited."

Further on the court said:

"The cases which have established the rule that the statute authorizing an assessment must fix the legal standard to which it shall be made to conform have not turned on the phraseology of constitutional provisions. It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so, there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection, courts have held that legislative enactments must set up a standard, fix a rule, to be conformed to as a guide in all cases,—a uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications to different individuals of the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppression."

A like ruling was made on a like statute in Bogert *v.* City of Elizabeth, 27 N. J. Eq. 568, cited by MR. JUSTICE HARLAN. How much more so should it be held that the Missouri statute is obnoxious to the fundamental right of private property when it not only directs that the apportionment of such special tax shall be according to the front foot, but does not even limit the discretion of the governing council in making the assessment to any consideration of its equity or justice? Who can tell in this case by what consideration the council of Springfield distributed the cost of this work

according to the front foot? Did they consider the relative benefits of each lot, or the value thereof, or the convenience of the owner, or his ability to pay, or all combined? Following the same thought, MR. JUSTICE HARLAN (172 U. S. 281, 19 Sup. Ct. 191) said:

"It will not escape observation that, if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required in the first instance to open the street at his own cost without compensation in respect of the land taken for the street; for by opening the street at his own cost he might have at least saved the expense attending formal proceedings of condemnation."

It is argued here in support of this assessment, as was done in Village of Norwood Case, that the court ought not to interfere by injunction, because the complainants did not show nor offer to show by proof that the amount of the assessment upon their property was in excess of the special benefits accruing to it by reason of the opening of the street; and the bill of complaint in this case is vigorously assailed because it does not in terms so aver. To this the court replied:

"This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the specific benefits accruing to the abutting property, a decree might properly have been made, enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such

be its value, and the less, therefore, will it be taxed. The judgment must be reversed for proceedings consistent herewith.

NOTE.

Municipal Corporations—Taxation of Land Not Benefited.—The above decision brings the court of Kentucky into line with the weight of authority. Linton *v.* Athens, 53 Ga. 588; Martin *v.* Dix, 52 Miss. 53; Kelly *v.* Pittsburgh, 85 Pa. St. 170; Municipality No. 3 *v.* Michaud, 6 La. Ann. 605; Allen *v.* St. Louis, 13 Mo. 400; Russell *v.* St. Louis, 9 Mo. 507; Lee *v.* Thomas, 49 Mo. 112; Walden *v.* Dudley, 49 Mo. 421; Giboney *v.* Cape Girardeau, 58 Mo. 141; Patterson *v.* McReynolds, 61 Mo. 203; Turner *v.* Althaus, 6 Neb. 54; Hurla *v.* Kansas City (Kan.), 38 Am. & Eng. Corp. Cas. 504; Davis *v.* Point Pleasant (W. Va.), 32 Am. & Eng. Corp. Cas. 666; Mendenhall *v.* Burton, 42 Kan. 570; Weeks *v.* Milwaukee, 10 Wis. 242; Cary *v.* Pekin, 88 Ill. 154; Hewitt's Appeal, 88 Pa. St. 55.

FAY *et al.*

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trarily assume that such local property is benefited in the proportion of the frontage thereof are invalid, unless the opportunity is afforded, at some period in the progress of assessment and the enforcement thereof, to be heard upon the question of fact as to whether or not the benefit is equal to the burden imposed, and as the supreme court of the state holds that, notwithstanding no notice or hearing is provided therefor when the tax is imposed by the city council, the owner when sued for the enforcement of the special tax cannot be heard to defend upon the ground that his property was not in fact benefited, nor upon the question as to whether the apportionment of the costs is equal among the several lot owners, the statute is violative of the fourteenth amendment of the federal constitution, and the whole tax may be enjoined. Following Village of Norwood *v.* Baker, 19 Sup. Ct. 187, 172 U. S. 269.

(Syllabus by the Court.)

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"That there is hereby levied and assessed a special tax against the lots and pieces of ground hereinafter described to pay for the construction of a brick pavement of Commercial street from the center of Boonville street to the center of Benton avenue, as provided by resolution No. 370, approved June 9, 1898. The assessments herein charged being apportioned among the several lots and pieces of ground made

liable therefor by the block, according to the front foot thereof, as follows."

The ordinance then set out a description of the lots thus assessed by the front foot, among which are the lots owned by the complainants severally. The aggregate amount of this work is $12,657, and tax certificates upon said assessment were issued to said Myrick by the city council against each of the owners of lots abutting on said street within the limits specified in said ordinance in proportion to the frontage of the lots. The bill alleges that the city assumes and claims that the statute under which it was incorporated confers upon it authority to so levy and collect said taxes, and all other taxes for local improvements heretofore levied by it based upon the number of front feet abutting on such improvement, without limit as to the amount thereof, and without reference as to the value of the property, or the betterment, if any, conferred upon the owner of the property by the improvements, and that the same is not in conflict with the constitution of the United States or of the state of Missouri. The bill alleges that while the city, in assessing said taxes, conformed to the provisions of the law under which it attempted to act, yet said act is in conflict with the constitution of the United States, especially the fifth and fourteenth amendments thereof. It is also averred that a part of the lots so taxed are well improved and of much greater value than others which have no improvement and are of but little comparative value. There are other averments contained in the bill which are not material to be recited. The bill prays for a decree declaring the act of the legislature under which the proceedings were had to be inoperative, for the reason that it is in conflict with the constitution of the United States and the amendments thereto, and that the tax so assessed thereunder be declared void, and the collection thereof perpetually enjoined. The bill is brought in behalf of the complainants and all other persons similarly affected by the attempted exercise of the power claimed. The cause is heard on an application

for a temporary injunction. The defendants have filed an answer to the bill, but not under oath.

I am unable to perceive why this case is not controlled by the ruling of the supreme court in Village of Norwood *v.* Baker, 172 U. S. 269, 19 Sup. Ct. 187. The provision of the Ohio statute, on which that case depended, was similar, in legal effect, to the statute of Missouri and the ordinance of the city of Springfield, under which the assessments were made. The Ohio statute provided that, where an improvement of an existing street should be ordered and made, the expense thereof, when not assessed as a general tax to be paid by the municipality generally, "shall be assesssed by the council on the abutting and such adjacent and contiguous and other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made." The case decided by the supreme court, *supra*, was that of an assessment based upon the last clause above quoted, by the front foot of the property bounding and abutting upon the improvement. The Missouri statute under which this special tax was imposed (subsection 3, § 1495, Rev. St. Mo. 1889) provides that:

Repaving Street —Local Assessments—Front-Foot Rule—Benefits—Right to Question—Constitutionality of Statute.

"For paving, macadamizing, curbing and guttering all streets, avenues and alleys, and repairing same, and for doing all excavating and grading necessary for same, after said streets, avenues and alleys have first been brought to grade, * * * the assessment shall be made for each block separately, on all lots and pieces of ground on either side of such street or avenue, the distance improved or to be improved, or on lots or pieces of ground abutting on such alley, in proportion to the front foot."

Section 1496 then declares that:

"The assessments made in pursuance of the second and third clauses of the second subdivision of the preceding section shall be known as special assessments for improvements, and shall be levied and collected as a special tax, and a special tax bill shall issue therefor, and be paid in the manner provided by ordinance. Said special tax may bear interest after thirty days from the date of issue and presentation of same at the rate of ten per cent. per annum; and every such special tax bill shall be a lien against the lot of ground described in the same until the same is paid."

While it is true that the Ohio statute differs from the Missouri statute, in that, in addition to the mode of assessment by the front foot, it gave to the council the power to apportion the cost of such improvement upon the abutting lot owners in proportion to the benefits resulting from the improvement, or according to the value of the property assessed, yet the city of Norwood did not see fit to pursue either of the last two methods. How this difference in the two statutes is to help the defendants is not apparent. It only shows that it was in the mind of the legislature of Ohio that the matter of apportionment of such burden could be predicated upon the basis of relative benefits bestowed upon the abutting property, or according to the relative value thereof; whereas the Missouri statute contains no such provision whatever respecting betterments, or the relative value of the property touched. On the contrary, the Missouri statute provides absolutely, independent of any consideration of benefits conferred upon the lot owner by the street improvement, and independent of any consideration of relative value of the property assessed, "that the assessment shall be made for each block separately on all lots and pieces of ground on either side of such street, the distance improved or to be improved, or on the lots or pieces of ground abutting on such alley, in proportion to the front foot." The Ohio statute further provided, in case an apportionment of the costs was directed on the basis of benefits, a method in

advance of such assessment for ascertaining the benefits and apportioning the same. Section 2277, Rev. St. Ohio. But, as persuasive proof that it was not in the mind or purpose of the framers of the Missouri statute that any such ascertainment should enter into the apportionment, no method whatever is provided therefor; and the ordinance adopted by the city council clearly enough shows that the matter of relative betterments, as a basis for the apportionment, was not contemplated or provided for. After passing the resolution that the work be done, the first section of the ordinance "levied an assessment and special tax against the lots; * * * the amounts herein charged being apportioned among the several lots and pieces of ground made liable therefor by the block, according to the front foot thereof." It is to be conceded that the courts of this state, while admitting that the only permissible theory under the fundamental law upon which a special tax for street improvements can be assessed against the property of the individual member of the municipal community is on the ground of special benefit conferred thereby not common to the whole community, yet they have maintained that this requirement is fully met by arbitrarily apportioning the cost of the improvement according to the front foot throughout the extent of the street. Without reviewing the cases in general, this has practically been recognized in a perfunctory way. This doctrine culminated in an opinion by JUDGE WAGNER in City of St. Louis *v.* Clemens, 49 Mo. 552. As the opinion shows, the court first ruled that, regardless of the completion of the contract along the whole line of the street to be improved, any one lot might be assessed for the cost of the work done on its immediate front, no matter if, instead of benefiting the lot, the work done practically ruined its value; thus fitly illustrating how intolerable the rule that would arbitrarily subject the private property of the citizen to the burden of public improvement when separated from the basal proposition of benefits bestowed equal to the burden imposed.

JUDGE WAGNER, when confronted with this dilemma, receded, and said:

"The property must bear its just burden to the whole work according to its frontage. Any other construction would be unequal and unjust, and contrary to the theory of supposed benefits which support and uphold these laws. Grading in front of a given piece of property may be a damage instead of a benefit, and it will not be presumed that the property holder should be obliged to pay for the whole work that causes his damage. The assessment should be made in the proportion which the whole frontage of any particular lot bears to the entire work."

After thus recognizing the foundation of the rule of special assessments, it seems to my mind to be irreconcilably contradictory to say that the requirement is fully met by an apportionment based solely upon the frontage of the lots on the street, without any regard whatever to the fact of whether or not the particular lot is benefited at all by the work done throughout the length of the street improved, and without any regard to the fact of whether or not the benefit bestowed is equal, as between all the lots fronting on the street. It is to be observed that the learned judge had just recognized the demand of justice that the particular lot should only bear its just proportion, and therefore an assessment which should be made for the cost of the work done in the immediate front of the lot might be ruinous rather than beneficial to it. This being unquestionably correct, exactly how this condition of the particular lot thus inconvenienced or left by the improvement could be changed into a benefit by completing the extension of the street throughout the distance covered by the contract is incomprehensible, as also why gross inequality might not continue to exist among the lots assessed after the completion of the work. The utmost that can be urged in favor of the front-foot rule, as applied to the case at bar, is, as has been suggested by counsel, that it is the policy of the state legislature on this subject, which rests for its support upon the bald assumption that reasonable

equality is attained by this method; that is to say, if the legislature should declare that the cost of opening and paving streets in cities of the third class shall be assessed upon one block most centrally situated along the line of the street, the act should stand, because it is the declared legislative policy of the state, and because, in the judgment of the legislature, the method reasonably approaches equality and justice. Statutes in this and other states, which provide that the cost of such improvement shall be assessed where the lots touch, according to their value, furnish more nearly a rule of equality, for they are based upon the underlying principle of the revenue laws of the state, which require every citizen to contribute towards the burdens of government according to the assessed value of his property, as that bears some reasonable relation to the quantum of protection or benefit his property receives. At all events, it is less instinct with inequality and injustice than the front-foot rule, which utterly ignores the relative benefits received by the several lots called upon to contribute.

The discussion in Barnes *v.* Dyer, 56 Vt. 469, cited in Village of Norwood Case, is quite pertinent to this contention of defendants. Under the act of the legislature under review in that case, the city council was authorized to assess the owners of abutting property for a street improvement "so much of the expense thereof as they shall deem just and equitable." The statute further provided for—what the Missouri statute does not—notice, hearing, and appeal. The constitutionality of this act was successfully attacked by the property owner sought to be taxed under it. The court held that the language "as they shall deem just and equitable" fixed no definite standard by which the rights of the taxpayer were to be protected, as it was impossible from the terms employed to know upon what theory the council proceeded in determining what was equitable and just, whether it was in view of benefits bestowed, or upon the value of the land, or personal convenience to the owner, or of his ability to pay,

or all combined. The court, after referring to JUDGE DILLON'S discussion of this question, said:

"The act in question makes no express allusion to the assessment on account of benefit; neither does it limit the assessment to the amount of benefit. Yet, as we have seen, the right to assess at all depends solely on benefit, and must be proportioned to and limited by it. An improvement might cost double the benefit to the land especially benefited."

Further on the court said:

"The cases which have established the rule that the statute authorizing an assessment must fix the legal standard to which it shall be made to conform have not turned on the phraseology of constitutional provisions. It is everywhere treated as a general constitutional principle that no member of society shall be compelled to contribute more than his proportion. Unless this is so, there is no protection against arbitrary injustice in the imposition of taxes. To secure this protection, courts have held that legislative enactments must set up a standard, fix a rule, to be conformed to as a guide in all cases,—a uniform, certain rule, so far as reasonably practicable, and not susceptible to different applications to different individuals of the class to which it applies. If the enactment fails in this regard, it is deemed fatally defective. The proposition is sound, because it is an adherence to the fundamental principles which in a constitutional government are designed to protect the individual against injustice and oppression."

A like ruling was made on a like statute in Bogert *v.* City of Elizabeth, 27 N. J. Eq. 568, cited by MR. JUSTICE HARLAN. How much more so should it be held that the Missouri statute is obnoxious to the fundamental right of private property when it not only directs that the apportionment of such special tax shall be according to the front foot, but does not even limit the discretion of the governing council in making the assessment to any consideration of its equity or justice? Who can tell in this case by what consideration the council of Springfield distributed the cost of this work

according to the front foot? Did they consider the relative benefits of each lot, or the value thereof, or the convenience of the owner, or his ability to pay, or all combined? Following the same thought, MR. JUSTICE HARLAN (172 U. S. 281, 19 Sup. Ct. 191) said:

"It will not escape observation that, if the entire cost incurred by a municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required in the first instance to open the street at his own cost without compensation in respect of the land taken for the street; for by opening the street at his own cost he might have at least saved the expense attending formal proceedings of condemnation."

It is argued here in support of this assessment, as was done in Village of Norwood Case, that the court ought not to interfere by injunction, because the complainants did not show nor offer to show by proof that the amount of the assessment upon their property was in excess of the special benefits accruing to it by reason of the opening of the street; and the bill of complaint in this case is vigorously assailed because it does not in terms so aver. To this the court replied:

"This suggestion implies that, if the proof had showed an excess of cost incurred in opening the street over the specific benefits accruing to the abutting property, a decree might properly have been made, enjoining the assessment to the extent simply that such cost exceeded the benefits. We do not concur in this view. As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits. The assessment was by the front foot and for a specific sum representing such

cost, and that sum could not have been reduced under the ordinance of the village, even if proof had been made that the costs and expenses assessed upon the abutting property exceeded the special benefits. The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one."

Same—Same—Same—Same.

It is to be conceded to the contention of defendants' counsel that if, notwithstanding the statute in question makes no provision either before or at the time or after the assessment of the special tax for a hearing or contest by the lot owner as to whether or not his property is benefited by the improvement as charged against his lot, yet, if when sued on the tax bill he has the right to defend thereto on the ground that his property received no benefit, and can in this manner have this right adjudicated, then the statute is not unconstitutional as to this assessment, as he would thus have his day in court to contest its validity in this respect. Because of some confusion in the language of the judge who wrote the opinion in the particular case, this question is not free from some embarrassment, and to its consideration I have given careful attention, as I have no disposition to produce any conflict of opinion with the supreme court of the state touching so vital and important a question as this case presents, especially where its construction of the state statute is binding on the federal court.

In City of St. Louis *v.* Richeson, 76 Mo. 470, it would seem, on a casual reading, as if the court had sustained this contention of counsel; but, read in the light of the real question involved in that case, the decision does not go to the extent claimed for it. That was a condemnation proceeding, authorized by the charter to be instituted before one of the circuit courts of St. Louis, directing, upon the filing of a petition, that a summons should issue, giving the defendant 10 days' notice of the hearing of the petition. It further provided that, upon the court being satisfied that due notice had

been given, it should appoint commissioners to assess damages which the owners of land may severally sustain by reason of such appropriation. The fifth section of the charter made it the duty of the commissioners to ascertain the actual value of the land proposed to be taken, without reference to the projected improvement and the actual damage done to the property thereby, and for the payment of such values and damages to assess against the city the amount of benefit to the public generally, and the balance against the owners of the property especially benefited by the improvement, in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement. It is further provided that the amounts to be paid by the owners of property especially benefited, as ascertained by the commissioners, should be a lien on the property so charged. The act further provided that the report of the commissioners might be reviewed by the circuit court on exceptions filed, whereupon the court should make such order therein as right and justice might require, and might order a new appraisement upon good cause shown; that the hearing of such exceptions should be summary, etc. It further provided that tax bills should be issued therefor, and after the expiration of 60 days the unpaid bills should be turned over to the city counselor for collection by suit in the name of the city. To one of such suits the owner of a parcel of land appeared and answered, setting up that he had had no notice of said proceedings resulting in the taxation of his property at any time during its pendency, and claimed that the assessment and judgment were in contravention of the fifth amendment to the federal constitution. The court sustained a demurrer to this answer. A majority of the supreme court sustained this action of the circuit court, for the reason that the defendant, when sued upon the tax bill, might maintain, "by way of answer, any good and valid defense he might have, or which he could have presented to the original proceedings in the circuit court for the condemnation of said property and the assessment of said benefits, if he

had been made a party thereto and had notice thereof. But the answer actually made by the defendant was that he was not a party to, and had no notice of, said original proceedings in the circuit court, etc. It may be conceded that this answer is true, and yet, if our construction of the charter and ordinance is correct, this answer, in the language of the demurrer, does not state facts sufficient to constitute a defense to this action. It may be true that he was not a party to said original proceeding during its pendency, and had had no notice thereof; yet that fact is wholly immaterial, if he is a party thereto, duly notified, and can be heard in his defense herein. In this particular we think the defendant in his answer misconstrued the charter, ordinance, and proceedings thereunder, and mistook his rights and remedy in the premises. The demurrer to the answer as filed, therefore, was rightfully sustained." It is to be observed in the first place that the fifth section of the charter in question provided, first, "for the payment of such values and damages, to assess against the city the amount of benefit to the public generally, and the balance against the owners of all property which shall be especially benefited by the proposed improvement, in the opinion of the commissioners, to the amount that each lot of said owner shall be benefited by the improvement." That is to say, the one feature which most distinguishes that charter from the statute in question is that the commissioners were authorized to apportion the balance to the private lot owner as he should be benefited by the improvement. Under this charter, therefore, his lot could not be subjected to a tax greater than the benefit received from the improvement; whereas, under the statute in question, the cost of the improvement is to be apportioned according to the front foot, without regard to the amount of benefit the owner receives therefrom. In other words, the right of the property owner under the St. Louis charter not to be subjected to a greater burden for the cost of the improvement than the benefit he received therefrom was preserved in the very law which subjected him to the tax. And inasmuch as

the statute which conferred upon the circuit court the power to proceed to judgment in the case demanded that the property owner should have notice and a hearing thereon, with the express direction that if the circuit court, as a court of general jurisdiction, is of opinion that the assessment was unduly apportioned, it "shall make such order therein as right and justice may require, and may order a new appraisement," it made the assessment imposed upon the defendant subject to this right of review and readjustment by the court, as "justice may require." And therefore the court held that, if the circuit court proceeded to judgment of condemnation and assessment of benefits without notice to the defendant, this right was not wholly gone, but he might, when sued for the enforcement of the tax, make such defense thereto as he could have made in the first instance in the circuit court. But no such provision is found in the statute in question. On the contrary, the power conferred on the city council is imperative, and without discretion, to apportion the cost of the improvement of the whole street upon the abutting lot owners "in proportion to the front foot." This is emphasized by the provisions of section 1498 of this statute, which provides that the city council shall have power, by resolution, to declare that the work or improvement is "necessary to be done," and after providing for the publication of such resolution for two weeks, unless a majority of the resident owners of property liable to taxation therefor filed a protest against such improvement, "then the council shall have power to cause such improvement to be made, and to contract therefor, and to levy a tax as herein provided." So that, if it could be held that under this statute the defendant when sued upon the tax bill could make defense thereto, such defense could, in the very nature of things, be no greater than he could have made to the assessment if notified thereof during the pendency of the proceedings with the right to a hearing; and the court, by the statute itself which would be the source of its power, could do nothing more than to see in the matter of benefits that the proportion assessed against the lot was not

greater than the frontage thereof. A moment's consideration of this aspect of the statute in question will demonstrate the fact that an attempt by the trial court in a suit for the enforcement of a tax bill to try and determine the question of benefit to the defendant's lot would thwart the whole scheme of this statute for the apportionment of such special assessment. The tax being a statutory lien, under the state practice the suit would be an action at law, in which either party would be entitled to demand a jury. Suppose in such trial the jury should find that the particular lot was unduly assessed by at least one-half more than the benefit received; as the other lot owners would not be parties thereto, there could be no ascertainment binding on them as to how much they should have been assessed; nor would the trial court have power under this statute, as in the case of the St. Louis charter, to direct a readjustment of the assessment on the lots. Likewise, in separate suits against the lot owners, varying results might be reached by the jury, the sum of which would be a dislocation and disarrangement of the whole assessment, defeating the declared purpose and language of the statute, which demands that the apportionment shall be by the front foot, and by no other means. The contractor could not go back to the city council and have new certificates issued which could bind any lot owner to a proportion greater than that established in the judicial proceeding. As the claim of the contractor is not an obligation of the municipality, how would he be paid for his work? The situation thus presented is quite different from that class of cases where the taxpayer defends against the suit on the ground that the statute or the ordinance which authorized the imposition of the tax has not been complied with, or that the work done by the contractor is not done in conformity to the contract, and therefore the contractor, in justice and good conscience, is not entitled to collect the amount expressed in the certificate. He loses in such case to the extent of his default. In other words, he loses nothing, because he has not earned his demand under the statute and under the contract. Not so in a case like

this, where no question is made that the contractor has not in all respects performed his contract, and the value of the work is equal to the sum of the certificates which have been issued to him in strict conformity to the statute on the "front-foot rule." I furthermore assert that the supreme court of this state since the decision in the Richeson Case, *supra*, has expressly decided that in a suit on such tax bill, where the assessment has been apportioned on the front-foot rule, the taxpayer cannot defend on the ground that the particular lot was not in fact benefited. In Farrar *v.* City of St. Louis, 80 Mo. 379, the statute in question directed that when the work "is completed the president of the board of public improvements shall compute the cost thereof respectively in the proportion that the linear feet of each lot fronting or bordering on such improvement bears to the total number of linear feet of all the property chargeable with the special tax, and shall make out and certify to the comptroller, on behalf of the contractor, bills of such cost and assessment accordingly as required by law." Among the defenses interposed in that case was the following:

"That the ordinance makes no provision for ascertaining the benefits to the public; but assesses the whole cost thereof equally upon each linear foot fronting on said avenue."

JUDGE NORTON, after reviewing the rulings of the supreme court of the state touching this question, said:

"Having shown that the charter of the city confers upon it power to pave and reconstruct its streets, and to assess the cost of the work on the adjoining property, without binding it to any method of apportioning the cost, but leaving the municipal authorities free to adopt any method not forbidden by the constitution or general laws of the state, it follows that they might adopt any method in apportioning the cost which the legislature could adopt."

Further on he said:

"The liability of lots fronting on the street, the paving of which is authorized to be charged with the cost of the work

according to their frontage, having been thus so repeatedly asserted, the question is no longer an open one in this state, and we are relieved of the necessity of examining authorities cited by counsel for plaintiff, condemning what is familiarly known as 'the front-foot rule.' While irregularities arising in the enforcement of the rule in consequence of irregularities in the situation and depth of lots may afford a reason for an appeal to the legislative power of the state for their rectification, they would not justify the courts in invading the domain of the legislature."

And as further incontestable proof that in the mind of the supreme court where the legislature has arbitrarily fixed as the basis of the assessment the mere frontage of property, without regard to its value or extent of its improvement, no inquiry is permissible by way of defense to such assessment when made by the front foot, he asserts by way of quotation, on page 395, that:

"It is not in the power of the courts to enforce any fancied scheme of equality seeming to them more just than the one adopted by the legislature. The latter department of the government is wisely intrusted with the entire control of this subject, and, if practical injustice is done, the remedy is with the people." Again: "It is not whether the tax will produce perfect equality of burdens, nor whether the power may not be abused. We know too well that under any system of taxation these things may and do happen. They are evils not within the powers of the courts to remedy. It is for the legislature to guard against them."

This case was followed by that of Rutherford *v.* Hamilton, 97 Mo. 543, 11 S. W. 249, in which the defense was sought to be made that the act was unconstitutional, "because the cost of the sewer was apportioned by the city engineer against the property fronting on the improvement in proportion to the frontage of each lot, without considering the amount of actual benefits conferred by the sewer on each lot owner." And it was held not only that the front-foot rule obtained in the state, but, in effect, that such an assessment was con-

clusive on the property owner as to the amount of benefit received. Again in Keith *v.* Bingham, 100 Mo. 300, 13 S. W. 683, it was again held that "the fact that the street did not benefit but damage the property sought to be charged with the tax bill is no defense to an action on the latter." As further proof that this is the opinion of the supreme court, in City of Nevada *v.* Eddy, 123 Mo. 546, 27 S. W. 471, CHIEF JUSTICE GANTT (123 Mo. 562, 27 S. W. 475) said:

"The power, under section 1495, Rev. St. 1889, is in the municipality to determine the necessity of the improvement, subject to the protest of a majority of the resident adjoining owners, and to assess it on all lots and pieces of ground abutting on the improvement according to the front foot thereof. The owner without a building is taxed in the same proportion as one who owns a valuable building, or, mayhap, a palatial residence."

Language could not more forcibly emphasize the fact, not only that the front-foot rule is arbitrary, regardless of the respective benefits to the property touched, but that it admits of no contention that the party assessed is not benefited at all. But it is suggested that JUDGE GANTT in the later case of Bank *v.* Carswell, 126 Mo. 436, 29 S. W. 279, held that this mode of assessment was not conclusive on the property owner, and that he might make defense of no benefit to a suit on the tax bill. If this were so, it certainly would not be creditable to the consistency of the supreme court of the state, and would be a remarkable achievement of tergiversation. The assessment in that case was made, under the general statute (sections 1404–1447, c. 30, Rev. St. 1889), by a city of the second class, which provided that the assessment should be made on the basis of the "value of all the property to be charged with the cost thereof, exclusive of the improvements thereon, by the city assessor, which assessment shall be delivered to the city engineer. * * * The city engineer shall compute the cost thereof and apportion the same among the several lots or parcels of property * * * according to the value thereof fixed by the city assessor aforesaid; and charge each lot or

parcel of property with its proper share of such cost." The apportionment was not according to the front foot, but it was on the basis of the assessed value of the property to be charged therewith, and each lot or parcel of property was to be charged "with its proper share of such cost." The statute further provided "that nothing in this statute shall be so construed as to prevent any defendant from pleading in reduction of the bill any mistake or error in the amount thereof, or that the work therein mentioned is not done in a good and workmanlike manner; and that if any party shall set up by way of defense that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit tendered to the contractor, or other holder of the bill, the full value of the work done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for the costs shall be rendered against the plaintiff. The sole ground of defense in that case was that the tax was in contravention of the state and federal constitutions, "in that it sought to take defendant's property without due process of law, in that it sought to create a lien on his property and compel him to pay a local assessment without an opportunity to be heard on the matter." No question was presented in that case by the pleadings asking for any reconsideration of the question theretofore settled by the supreme court that in such suit the party could not defend on the ground of no benefits received, or authorizing the court to pass upon such question. Therefore the court simply held that the statute in that case was constitutional, and that the city "had the power to impose on the property owners the burden of the grading of the street, and this it has done by the charter, and it was competent for the legislature to empower the city to make the contract for grading. No notice was required to be given the defendant of the passage of the ordinance or the letting of the contract. * * * The only defense to this action is the unconstitutionality of the charter provisions of cities of the second class,

and not the amount or correctness of the tax bill." Instead, therefore, of this ruling sustaining the contention of defendants' counsel, the express language of the judge is that the amount or correctness of the tax bill is not matter of defense. The offer, therefore, of defendants on this preliminary hearing to show by affidavits that in the opinion of affiants one of the lots in question was as much benefited by the improvement as another, and that the lots, independent of the improvements thereon, are of equal value, is no answer to the abuse which the statute invites. The inherent vice of the statute lies in the unbridled discretion conferred by it upon the municipal council, and the impossibility thereunder of judicially ascertaining what was in the mind of each member of the board in making the apportionment. As said by MR. JUSTICE PECKHAM in U. S. *v.* Trans-Missouri Freight Ass'n, 166 U. S. 318, 17 Sup. Ct. 550:

"The only proper way to construe a legislative act is from the language used in the act, and upon proper occasion by a resort to a history of the times when it was passed," and, further, that "it is the duty of courts to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates."

This rule is always imperative where the language of the statute is plain and unambiguous. Sedg. St. & Const. Law, 194–251. In such case the statute must stand for a reason, and the courts are not at liberty to look outside of it for some specious meaning or import that may impart validity to it when assailed for its glaring violation of a constitutional right of the citizen. The chief justice in Bogert *v.* City of Elizabeth, *supra*, pertinently observed:

"This order [ordinance here] is so plain and definite that it is impossible by construction to contract it within constitutional bounds. There is not a hint in the clause suggestive of the idea that the land on the line of the street is not to be burdened beyond the degree to which it is especially benefited."

In the very nature of the power imposing this special tax

upon the abutting property there must be some method of ascertainment, and some time of determining, the question of fact as to whether or not one lot is subjected to an undue burden compared to that apportioned to the other lots alike situated. The whole burden of such tax cannot be placed upon a single lot on the ground that the whole is not greater than the betterment of such lot, unless the other lots on the streets derive no benefit therefrom. The burden should be distributed ratably among the several lots in the relative proportion of the benefits received by them. This is so just and reasonable as to hardly require the support of authority. Dill. Mun. Corp. § 671, in discussing this rule says:

"The decided tendency of later decisions is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality." And further on: "That the special benefits actually received by each parcel of contributing property was [is] the only principle upon which such assessments can justly rest."

In Tide-Water Co. *v.* Coster, 18 N. J. Eq. 519, the court said:

"The rule must, at least, be one which it is legally possible may be just and equitable as between the parties assessed."

To the same effect in Bogert *v.* City of Elizabeth, *supra*, the court said:

"The sum of the expense is ordered to be put on certain designated property, without regard to the proportion of benefit it has received from the improvement."

And this was held to be fundamentally wrong.

Equality is equity. And the right of the owner of a lot to have this burden of special tax ratably distributed among the lots benefited does not depend alone upon the state constitution exacting equal taxation, but has "its foundation in those elementary principles of equity and justice which lie at the root of the social compact" (*In re* Canal Street, 11 Wend. 154–156), and he can therefore invoke for its security and protection the federal constitution, which inhibits not only

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the taking of private property for public use without just compensation, but the deprivation thereof without due process of law, and denies to the state the power to "deny within its jurisdiction the equal protection of the laws." Following what I conceive to be the ruling of the supreme court in the Village of Norwood Case, *supra*, the temporary injunction asked for is granted.

NOTES.

Local Assessments—Benefits.—See State (Frevert *et al.*, Prosecutors) *v.* Mayor, etc., of City of Bayonne, 1 Mun. Corp. Cas. 299, and *note* 305.

Same—Notice to Property Owners.—Wakeley *v.* City of Omaha *et al.*, 1 Mun. Corp. Cas. 557, and *note* 560.

Same—Front-Foot Rule.—It is ordinarily held that assessments for benefits may lawfully be made on abutting premises according to the foot frontage rule of valuation. Spring Garden *v.* Wistar, 18 Pa. St. 195; McGonigle *v.* Allegheny City, 44 Pa. St. 118; Magee *v.* Commonwealth, 46 Pa. St. 358; Stroud *v.* Philadelphia, 61 Pa. St. 255; St. Joseph *v.* Anthony, 30 Mo. 537; Fowler *v.* St. Joseph, 37 Mo. 228; Hand *v.* Elizabeth, 30 N. J. L. 365; Allen *v.* Drew, 44 Vt. 174; North Ind. R. Co. *v.* Connelly, 10 Ohio St. 159; Upington *v.* Oviatt, 24 Ohio St. 232; Neenan *v.* Smith, 50 Mo. 525; Emery *v.* San Francisco Gas Co., 28 Cal. 345; *In re* Washington Ave., 69 Pa. St. 352; Jones *v.* Board of Water Commissioners, 34 Mich. 273; White *v.* People, 94 Ill. 604; Wray *v.* Pittsburgh, 46 Pa. St. 365; Pittsburgh *v.* Woods, 46 Pa. St. 113; Raymond's Estate *v.* Borough (N. J.) 29 Atl. Rep. 156; Wilson *v.* City of Salem (Or.) 34 Pac. Rep. 9; *Id.* 691.

Same—Same—Held Unconstitutional.—In some states it has been held that the foot frontage rule of assessment is unconstitutional as a violation of the constitutional provisions requiring equality and uniformity in taxation. Norfolk *v.* Ellis, 26 Gratt. 224; Woodbridge *v.* Detroit, 8 Mich. 274; Motz *v.* Detroit, 18 Mich. 495; State *v.* Portage, 12 Wisc. 362; Peay *v.* Little Rock, 32 Ark. 31; Taylor *v.* Chandler, 9 Heisk. 349.

SEARS

v.

STREET COM'RS OF BOSTON.

BEALE *v.* SAME. BREWSTER *et al. v.* SAME.

(*Supreme Judicial Court of Massachusetts, May 18, 1899.*)

Local Assessments — Validity.* — A local assessment of sewer charges must be founded upon special and peculiar benefits to the property assessed from the expenditure on account of which the tax is laid; and it must not exceed the value of such benefits.

Same—Constitutionality of Statute.*—A statute directing the street commissioners of a city to determine annually sewer charges to be paid by estates in the city, which permits such charges to be determined upon any grounds which they may deem just and proper, is unconstitutional, as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate owner.

Same—Sewer Charges.—Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, they do not receive an additional special and peculiar benefit from the general oversight and operation of the sewers of the city, such as to subject them to a second special assessment.

Same—Constitutionality of Statute.—St. 1897 of Massachusetts, c. 426, directing the street commissioners of Boston annually to determine just and equitable sewer charges to be paid by estates in the city is unconstitutional because it purports to give to the commissioners power to levy special assessments on real estate upon other grounds than the receipt of special benefits, and to amounts beyond the amount, if any, of special benefits, and for expenditures which, as against such property, are not proper subjects of special taxation.

REPORT from supreme judicial court. *Judgment for petitioners.*

*See notes at end of case.

Sears *v.* Street Com'rs of Boston

R. Foster, *Wm. D. Turner*, and *J. M. Codman*, *Jr.*, for Beale.
J. B. Warner, for Frank Brewster.
Chas. F. Choate, *Jr.*, for Joshua M. Sears.
Andrew J. Bailey, for defendants.

KNOWLTON, J. These are petitions for a writ of *certiorari* to quash an alleged illegal assessment of sewer charges upon property of the several petitioners. The law under which the respondents assumed to act in determining these charges is St. 1897, c. 426, of which sections 7 and 8 are as follows:

"Sec. 7. The board of street commissioners, with the approval of the mayor, shall annully, before the 1st day of July, determine just and equitable sewerage charges to be paid by estates in said city for the construction, maintenance and operation of the sewerage works, taking into consideration in determining the charges the necessity of the works as caused by each estate; the amount of use thereof, if any, by the estate or its occupants; the benefit received therefrom by the estate; the amount of any assessment for a sewer paid by any owner of the estate; the length of time which has elapsed since such payment, and the use, if any, that has heretofore been made of the sewerage works by the occupants of the estate, and such other matters as they shall deem just and proper. The determination of such charges as aforesaid shall be final in all cases, and the amount thereof as determined for each estate shall be a lien thereon until paid, and said board shall notify the board of assessors of said city of the amount thereof forthwith after it has been determined, and the same shall be included in the next tax bill on the estate transmitted by said board to the collector, or in a tax bill therefor if no other tax bill is issued for such estate, and be included as part of the taxes on the estate.

"Sec. 8. All sewers and connections ordered to be made in constructing any way under the authority of the act of the year 1891 and of acts in amendment thereof or in addition thereto, shall be deemed to be constructed under the authority of this act, and the expenses therefor shall not be considered

in determining the assessable cost of the work to be assessed under the authority of said act."

The petitioners contend that these provisions of the statute are unconstitutional, and the most important questions in the case arise upon this contention. It is evident that these provisions cannot stand, as authorizing an assessment of a general tax, because the assessment called for is not proportional and equal. The statute not only directs an assessment upon a particular class of property, instead of on all taxable property, but it expressly requires, in determining the charges, the consideration of facts pertaining to particular estates in their relation to the charges, and to previous assessments, which prevent the making of a proportional assessment, viewing it as a general tax, and not as an assessment of benefits. If we treat the determination of these charges as a local and special assessment upon particular estates, we have to consider the principles on which such taxation is founded. It is well established that taxation of this kind is permissible, under the constitution of this commonwealth and under the constitution of the United States, only when founded upon special and peculiar benefits to the property from the expenditure on account of which the tax is laid, and then only to an amount not exceeding such special and peculiar benefits. City of Boston *v.* Boston & A. R. Co., 170 Mass. 95–101, 49 N. E. 95; Weed *v.* City of Boston, 172 Mass. 28, 51 N. E. 204; Proprietors of Mt. Auburn Cemetery *v.* City of Cambridge, 150 Mass. 12–14, 22 N. E. 66; Village of Norwood *v.* Baker, 19 Sup. Ct. 187; Sears *v.* Board (Mass.) 5 N. E. 138. Several of the questions now before us were considered at length in the recent case last cited, and it is unnecessary to repeat the discussion of them.

Local Assessments—Validity.

Does this statute prescribe taxation upon these estates for special and peculiar benefits only, or does it purport to authorize taxation on other grounds than special benefits, and for amounts larger than the amounts of such benefits? It directs the street commissioners annually to "determine just

and equitable sewer charges to be paid by estates in said city," etc. It requires them to take into consideration several subjects in determining these charges, one of which is the benefit received by the estate, and others of which possibly have some relation to the benefit received, and it then authorizes them to consider "such other matters as they shall deem just and proper." The benefits to be considered in taxing each estate are not, in terms, those that are special and peculiar, but, so far as the language goes, may be those that it receives in common with the other estates in the city, and with the inhabitants generally. The fact that the charges to be determined are for the construction, maintenance, and operation of the sewerage works of the whole city gives some force to the possibility of a construction which includes all benefits; but, whether this construction should be adopted or not, the charges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any great degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact in itself is enough to bring the statute within the prohibition of the constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law. Village of Norwood *v.* Baker, 19 Sup. Ct. 187; New Brunswick Rubber Co. *v.* Commissioners of Streets & Sewers in City of New Brunswick, 38 N. J. Law, 190; Barnes *v.* Dyer, 56 Vt. 469; Thomas *v.* Gain, 35 Mich. 155.

Same—Constitutionality of statute.

The general tenor of this section seems at variance with the law in regard to special taxation. It seems designed to group together a great variety of expenses, including all that are connected with the administration of the sewer department in the city of Boston, many of which are proper subjects for general taxation only, and to assess them all upon real estate. In determining the charge to be made upon any

particular estate, it is clear that most of the expenses to be reimbursed would be found to have been incurred in ways that could bring no special or peculiar benefit to that estate. The cost of constructing and maintaining sewers remote from it could confer no benefit. In two of these cases it appears by averments of the petition, which are not denied in the answer, that the estates of the petitioner have previously paid special assessments made by the city for the construction of sewers into which the estates drain, and in one of them it appears, in like manner, that no sewers have been constructed under St. 1897, c. 426, and no repairs made under the provisions of said act upon sewers already existing with which the estates of the petitioner have or can have any connection, or from the use of which said estates derive any benefit. Where lands have paid assessments for special benefits from the construction of all sewers by whose operation they are affected, it cannot be said that they receive an additional special and peculiar benefit from the general oversight and operation of the sewers of Boston, such as to subject them to a second special assessment. Expenses of this kind should be made the subject of general taxation. The grouping of these various expenses would seem to make it difficult, if not impracticable, under this statute, to make assessments of special and peculiar benefits directly received by particular estates from the construction of sewers near them. Indeed, it appears from the testimony that the street commissioners did not attempt to make assessments in accordance with the principles recognized as correct by the courts. They adopted a scheme, and applied it to the estates generally throughout the city, by which they charged, as a special tax, 3½ cents per $100 of valuation of the land, exclusive of buildings, together with one-fifth of the charge made for the use of water on the estate, with certain deductions from the charge for the use of water where the use was of a peculiar kind, like the manufacture of steam. This item of 3½ cents per $100 of valuation of land was made up of 1½ cents per $100

Same—Sewer Charges.

for general construction, which means construction in any part of the system of sewers, and 2 cents per $100 for general maintenance, which means the expense of salaries, care of sewers, coal, and other things pertaining to the management and operation of the system. That such expenses are proper subjects for general taxation, and not for special assessments, has often been decided. Hammett *v.* Philadelphia, 65 Pa. St. 146; Washington Ave., 69 Pa. St. 352; Appeal of City of Williamsport (Pa. Sup.) 41 Atl. 476; Dietz *v.* City of Neenah, 91 Wis. 422–427, 64 N. W. 299, and 65 N. W. 500; Dyar *v.* Farmington Village Corp., 70 Me. 527; Hanscom *v.* City of Omaha, 11 Neb. 37, 7 N. W. 739. In Erie *v.* Russell, 148 Pa. St. 384, 23 Atl. 1102, the court says: "Why should a sewer demanded and constructed by the city, and paid for by assessments on the property fronting on the street under which it is laid, be maintained and reconstructed on the order of the municipality at the expense of such property? It was made by the action of the city a part of its system of sewerage, which is as necessary for the health of its people as its paved streets are for their use. Its construction was at the expense of the abutting property, and properly so, in discharge of the obligation arising from particular benefits conferred. It is now a constituent of the general system ordained by the city for the convenience and health of its inhabitants. This system confers benefits which are general. It is a public necessity, and the expense of maintaining it should be provided for by general taxation." See Child *v.* City of Boston, 4 Allen, 41; Emery *v.* City of Lowell, 104 Mass. 13–16. In Sears *v.* Board, *supra*, this court held, with some hesitation, that watering streets, which before the passage of a statute on the subject was generally done at the expense of the abutters, conferred a direct and special benefit upon abutting property occupied for business or residence. Some other courts have held to the contrary. See City of Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829; Insurance Co. *v.* Prest, 71 Fed. 815. But in that case the relation of the expenditure

to the abutting property was very different from that of the expenditure for salaries and other expenses of maintaining a sewer department to property whose owners have previously paid assessments for the special benefits to be received from the use of the sewers. In assessing such benefits when the sewers were constructed, it was assumed that the sewers would be kept in operation for the benefit of the public, and that owners of property assessed would only be called upon to contribute, as general taxpayers, their proper share of the expenses of operating them. It is probable that most estates which drain into sewers in Boston were specially assessed when the sewers were constructed. Because the statute purports to give the street commissioners power to levy special assessments on real estate upon other grounds than the receipt of special benefits, and to amounts beyond the amount, if any, of special benefits, and for expenditures which, as against such property, are not proper subjects for special taxation, we are of opinion that the statute is unconstitutional.

Same—Constitutionality of Statute.

It is also contended by the petitioners that the statute gives owners of property no opportunity of being heard upon their liability to assessment. It is well established that the determination of the amount of taxes for special benefits to real estate by any tribunal to which the legislature delegates the power is a *quasi* judicial proceeding which cannot take final effect unless persons to be assessed have an opportunity to be heard. New London N. R. Co. *v.* Boston & A. R. Co., 102 Mass. 386; Parsons *v.* District of Columbia, 170 U. S. 45, 52, 54, 18 Sup. Ct. 521; Hagar *v.* Reclamation Dist., 111 U. S. 701–709, 4 Sup. Ct. 663; Irrigation Dist. *v.* Bradley, 164 U. S. 112–175, 17 Sup. Ct. 56; Stuart *v.* Palmer, 74 N. Y. 189; Remsen *v.* Wheeler, 105 N. Y. 573, 12 N. E. 564; *In re* Trustees of Union College, 129 N. Y. 308, 29 N. E. 460; Dietz *v.* City of Neenah, 91 Wis. 422–427, 64 N. W. 299, and 65 N. W. 500; People *v.* Board of Supervisors of Saginaw Co., 26 Mich. 22; Thomas *v.* Gain, 35 Mich. 155; Campbell *v.* Dwiggins, 83 Ind. 473; Ulman *v.* City of Balti-

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more, 72 Md. 587, 20 Atl. 141, and 21 Atl. 709. But, if a party has a right to appeal or to be heard upon an application for an abatement, it is sufficient. Weed *v.* City of Boston, 172 Mass. 28, 51 N. E. 204; Palmer *v.* McMahon, 133 U. S. 660, 10 Sup. Ct. 324; Redwood Co. *v.* Winona & St. P. Land Co., 40 Minn. 512, 41 N. W. 465, and 42 N. W. 473. See, also, Sawyer *v.* Board, 125 Mass. 182–186; City of Philadelphia *v.* Miller, 49 Pa. St. 440; Cleveland *v.* Tripp, 13 R. I. 50. This statute makes no express provision for notice or a hearing. It declares that "the determining of such charges as aforesaid [that is, by the street commissioners] shall be final in all cases," and provides for a notification of the determination to the board of assessors, and for the collection of the amount as a tax. In view of this language, it is difficult to see how the statute gives, by implication, an opportunity to be heard at any stage of the proceedings. But, as we hold this section of the statute unconstitutional on other grounds, it is unnecessary to determine this question. In each case the order must be: Writ of *certiorari* to issue.

NOTES.

Local Assessments—Validity.—A local assessment is unconstitutional so far as it exceeds the special benefit to the property assessed. Creighton *v.* Manson, 27 Cal. 620; Crawford *v.* People, 82 Ill. 557; Louisville *v.* Louisville R. M. Co., 3 Bush (Ky.) 416; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455; Zoeller *v.* Kellogg, 4 Mo. App. 163; Hanscom *v.* Omaha, 11 Neb. 41; Tide-Water Co. *v.* Coster, 18 N. J. Eq. 527; Matter of Canal St., 11 Wend. (N. Y.) 155; Chamberlain *v.* Cleveland, 34 Ohio St. 560; Holton *v.* Milwaukee, 31 Wis. 40.

See also State *v.* Mayor, etc., of Bayonne (N. J.), 1 Mun. Corp. Cas. 299 and *note*, p. 305, 2 Dill. Mun. Corp. § 752 *et seq.*, where the question is ably discussed in all its phases.

Assessment Fixed by Discretion of Municipal Authorities—Constitutionality.—In Church *v.* Fort Wayne, 36 Ind. 338, is construed a general municipal incorporation act of Indiana, which provides in respect of sewers, drains and cisterns that the assessment of the cost thereof shall be upon the owners of the property benefited thereby, "in such equitable proportion as the common council may deem just." See also, Thomas *v.* Gain, 35 Mich. 155.

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A statute empowering the authorities of a city to construct sidewalks and make local assessments on the property fronting the same, "for so much of the expense thereof as they shall deem just and equitable," is unconstitutional in that there is no fixed, certain and legal standard for assessment. Such assessment should be made in view of the benefit to the abutting land; but under this statute they may be made in view of the defendant's ability to pay. Barnes *v.* Dyer, 56 Vt. 469, 5 Am. & Eng. Corp. Cas. 503.

In State *v.* Newark, 8 Vroom (N. J.), 415, 18 Am. Rep. 729, the chief justice of New Jersey says: "The only safe rule is that the statute authorizing the assessments shall itself fix either in terms or by fair implication the legal standard to which such assessment must be made to conform. In no other way can property be adequately protected."

In New Brunswick Rubber Co. *v.* Commissioners of Streets and Sewers, 9 Vroom (N. J.), 190, 20 Am. Rep. 380, it was decided that where a statute authorized commissioners to assess the cost of a sewer upon lands benefited thereby in such proportion as they should deem just and equitable, no valid assessment could be made under the statute, as it failed to determine the mode of distributing the burden. KNAPP, J., in delivering the opinion of the court says: "In State *v.* Mayor, etc., of Paterson, 8 Vroom (N. J.), 412, an assessment certified to have been equitably made, was set aside as governed by no rule. It is not perceived how a legislative enactment which provides no rule or standard for making an assessment for a public work can have higher claim for validity."

In a note to Dillon's Mun. Corp. Sec. 761, the learned author makes this comment upon New Brunswick Rubber Co. *v.* Comm'rs of Streets, 38 N. J. Law, 190:—"The supreme court held the very strict view that a sewer act which authorized the commissioners of streets and sewers upon the completion of any sewer to 'ascertain the whole cost thereof and the size of all the lots drained thereby, and to fix the amount to be paid for each in such proportions as may in the judgment of the commissioners be just and equitable,' was unconstitutional because it failed specifically to determine the mode of distributing the burden; that is as we understand it, since no assessments can be made except for special benefits, the act ought distinctly to require the assessments to be made on this basis; but the act did not exclude this basis, and would probably be held elsewhere as sufficient to support an assessment which was in fact made upon the right principle. See, however, Thomas *v.* Gain, *infra*. Neither absolute certainty nor exact equality is practicable in such matters and cannot be judicially exacted. A similar provision to that condemned in New Jersey may be found in many of the States."

McCague

v.

City of Omaha.

(*Supreme Court of Nebraska, Feb. 23, 1899.*)

Local Assessments—Illegal Sales—Recovery of Purchase Money from City.—In absence of statutory authority, a city of the metropolitan class cannot be required to refund money received from a purchaser of real estate at a sale made thereof by the county treasurer for illegal special assessments or taxes imposed by the city. Pennock *v.* Douglas Co., 58 N. W. 117, 39 Neb. 293, and Merrill *v.* City of Omaha, 58 N. W. 121, 39 Neb. 304, followed.

Same—Same—Same—Statutes.—Sections 69 and 94, c. 12a, Comp. St. 1889, and section 144 of chapter 77, do not authorize the recovery from a metropolitan city of moneys received by it under a tax sale made to enforce the collection of illegal special taxes levied by the municipality.

Caveat Emptor.*—The rule of *caveat emptor* applies to purchasers of real estate at tax sales.

(Syllabus by the Court.)

Error by plaintiff to Douglas County district court. *Affirmed.*

R. W. Breckenridge, for plaintiff in error.

W. J. Connell, *Lee S. Estelle*, and *E. H. Scott*, for defendant in error.

Norval, J. The facts upon which this action was predicated may be summarized thus: The city of Omaha opened and extended South Nineteenth street through Hartman's addition; and, to pay the costs and expenses thereof, the municipal authorities levied special assessments upon the adjacent lots, including lots 60, 61, 66, 67, 72, 73,

*See note at end of case.

and 78 in said Hartman's addition to the city of Omaha. These special taxes or assessments not having been paid by the lot owners at the time the same became delinquent, the lots heretofore mentioned were sold by the county treasurer to Edward B. Baer, at private sale, for said special assessments. Subsequently said special taxes were adjudged null and void; and, the purchase money having been paid by the county treasurer to the city of Omaha, Edward B. Baer instituted this action against the city to require it to return said purchase money. Plaintiff has prosecuted error from the judgment rendered against him. In this court, Thomas H. McCague, as receiver of the German Savings Bank of Omaha, was substituted as plaintiff.

It is insisted by the city attorney that the precise question herein involved was decided adversely to the contention of this plaintiff in Pennock *v.* Douglas Co., 39 Neb. 293, 58 N. W. 117; and it is agreed that the court below determined this case on the authority of that decision. The correctness of the rule announced in Pennock *v.* Douglas Co., *supra*, is denied by plaintiff. It was there decided that, in the absence of statutory authority, a city of the metropolitan class cannot be required to refund money which it has received from a purchaser of real estate at a sale made thereof by the county treasurer for special assessments or tax levied by the city, and for which special assessment or tax said real estate was not liable. It was also held in that case that the rule of *caveat emptor* applies to a purchaser at a tax sale. It is now strenuously argued in the brief of counsel for plaintiff that the court in the Pennock Case incorrectly assumed that there was no statute under which one paying an illegal or void city tax may recover the same from the municipality. In this the learned counsel is in error. The court assumed no such proposition; but what it did hold was that there was no statute which authorized a metropolitan city to refund to a tax purchaser money paid on the sale of real estate for void special assessments; and upon an investigation of the subject anew, aided by able argument

Local Assessments—Illegal Sales—Recovery of Purchase Money from City.

of counsel, we discover no valid reason for changing our views upon the question. An examination of the arguments advanced by plaintiff's counsel will disclose that they are fallacious.

Attention is challenged to the following provisions of section 69, c. 12a, Comp. St. 1889, popularly known as the "Charter of Metropolitan Cities": Same—Same—Same—Statutes. "Any party feeling aggrieved by any such special tax or assessment or proceeding, may pay the said special taxes assessed or levied upon his, her or its property or such installments thereof as may be due at any time before the same shall become delinquent, under protest and with notice in writing to the city treasurer that he intends to sue to recover the same back, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter and not later, to recover back so much of the special taxes paid as he shall show to be illegal, inequitable, and unjust, the cost to follow the judgment or to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city treasurer shall promptly report all such notices to the city counsel for such action as may be proper." The first observation which we make of the foregoing provisions is that they had been repealed prior to the time, and were not in force, when plaintiff purchased the lots for the special taxes assessed against them. Moreover, these provisions have no application to the case at bar, and cannot be invoked by a purchaser at a tax sale. They conferred authority upon one paying illegal special taxes under protest after notice in writing to the city treasurer to bring an action against the city within 60 days thereafter to recover from the city such illegal taxes so paid by him. Plaintiff is not within the provision of this statute, since he did not pay these special assessments at all, much less under protest, but purchased the lots at treasurer's sale. Again, he did not institute this action within 60 days after his said

purchase. So, in no event is he in a position to invoke the statute under consideration.

The following portion of section 94, c. 12a, Comp. St., is relied upon by plaintiff: "The city council may at any time correct any error or defect, or supply any omission in the assessment or listing of any property subject to municipal tax made for the purpose of taxation for the then current fiscal year, and may require any and all persons to appear and answer under oath as to their possession or control of personal property subject to municipal taxation; and the mayor and council by ordinance may make such compromise, settlement, or adjustment of any action or litigation concerning the validity, legality or regularity of any tax or taxes levied for city purposes, as they may deem just and expedient, and the city treasurer shall conform thereto in his action respecting the collection of taxes under any tax list in his hand. These provisions shall apply to general municipal taxes and to special assessments, as far as the same are applicable, unless otherwise provided in the ordinance levying the same." We discover nothing in the above provisions which justifies the maintaining of the present suit. It would require either a great stretch of the imagination, or radical judicial legislation, to make said section applicable to a purchaser at tax sale. A mere reading of the section is sufficient to disclose that it has no bearing upon the question now before the court. Certainly the power given the city council to correct an error in the assessment or listing of property for the purposes of taxation does not carry with it the power to refund money received by the treasurer from the purchaser at a tax sale. The authority of the mayor and council to compromise or settle "any action or litigation concerning the validity, legality or regularity of any tax levied for city purposes," was given with reference to actions or litigations concerning the collection of the public revenues, and has no application to suits relating to the disbursements of moneys which have been paid into the treasury. This position is strengthened by the fact that the remainder of the same sentence from

which the last quotation was taken declares that "the city treasurer shall conform thereto in his action respecting the collection of taxes under any tax list in his hand." It is very evident this suit is not within either the letter or spirit of said section 94.

Another argument is that this action is maintainable under the second proviso of section 144 of the general revenue law (chapter 77, Comp. St.), which reads as follows: "If such person claim the tax or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason, except as hereinbefore set forth, when he shall have paid the same to the treasurer, tax collector, or other proper authority, in all respects as though the same was legal and valid, he may at any time, within thirty days after such payment, demand the same, in writing, from the treasurer of the state, of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district, or other subdivision, for the amount so demanded, and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases." It is urged that the foregoing is applicable to the case in hand, and Caldwell *v.* City of Lincoln, 19 Neb. 569, 27 N. W. 647, is cited in support of this contention. The above excerpt from said section 144 was considered in the Caldwell Case; and it was there ruled that it authorized the recovery from a municipal corporation of an illegal business tax paid under protest; and, by a parity of reasoning, it would seem that said section might justify a suit to recover special taxes and assessments paid which have been paid under protest. We did not hold a contrary doctrine in Pennock *v.* Douglas Co., 39 Neb. 293,

Collins *v.* City of Keokuk

ROBINSON, C. J. The petition alleges that the plaintiff is a resident and taxpayer of the city of Keokuk, and a consumer of water; that in June, 1877, the council of the defendant the city of Keokuk passed an ordinance which authorized the defendant the Keokuk Waterworks Company to establish such works and maintain waterworks within the city for the period of 20 years; that the company constructed and established such works, and maintained them, and supplied the city and its citizens with water, until the 9th day of October, 1896, when the council passed another ordinance, which took effect on the 1st day of January, 1897, and gave to the company the right to lay and maintain its water pipes and mains within the city for the period of 10 years from the time the ordinance took effect, for the purpose of securing water for public and private purposes for the city. The petition avers that the ordinance is void, because it was not submitted to a vote of the electors, and approved by a majority of them, at a general or special election, and for the further reason that the rates which it authorized are unreasonable. Portions of it are also alleged to be void on other grounds. We do not find that the petition asks any relief, but, since no objection on that ground is urged, we will consider some of the questions discussed in argument.

One ground of the demurrer is that the petition does not show that the plaintiff has an interest in the matter in controversy which entitled him to maintain this action. It is not shown that the plaintiff has any interest in matters affected by the ordinance not common to all persons who are taxpayers and residents of the city of Keokuk and consumers of water. It is not shown that the effect of the ordinance will be prejudicial to the interests of the city, and the plaintiff does not, therefore, show that his interests as a taxpayer may be affected. Nor does it appear that the plaintiff, and all other persons who may possibly be threatened with injury from certain provisions of the ordinance which are alleged to be illegal, on special grounds, would not have an ample remedy in the ordinary course of law. Section 3216 of the

Note

Code of 1873, under which this proceeding was commenced, authorized the writ of *certiorari* only in the cases where there was no other plain, speedy, and adequate remedy. The petioner in the case of Iske *v.* City of Newton, 54 Iowa, 586, 7 N. W. 13, sought to test the validity of an ordinance which prohibited the keeping of wine or beer for sale, but this court held, in effect, that the fact that he was a citizen and taxpayer of the city did not alone entitle him to maintain a proceeding by *certiorari*, and that, as he did not show that he had any right which the ordinance affected, the writ should have been denied. The rule thus announced is applicable in this case, and finds support in the following cases: Welch *v.* Board, 23 Iowa, 203; McHenry *v.* Sneer, 56 Iowa, 649, 10 N. W. 234; Smith *v.* Yoram, 37 Iowa, 89; News Co. *v.* Harris, 62 Iowa, 501, 17 N. W. 745. It is clear, under the statutes and authorities cited, that the plaintiff has not shown himself entitled to the writ.

The conclusion reached makes it unnecessary to determine whether the approval of a majority of the electors of the city, expressed at a general or special election, was essential to the validity of the ordinance, or whether, if the plaintiff is aggrieved by the ordinance, proceeding by *certiorari* is his proper remedy. It is also unnecessary to decide other questions discussed by counsel. The judgment of the district court appears to be right, and it is affirmed.

NOTE.

Certiorari.—In order that the writ may lie, some individual pecuniary interest in the proceedings to be reviewed must exist in the petitioner. Davids County *v.* Horne, 4 G. Greene (Iowa) 133; Watson *v.* May, 6 Ala. 133; Tucker's Petition, 28 N. H. 405; Powell *v.* Commissioners, 34 Ala. 278; Bath Bridge Co. *v.* Magoun, 8 Greenl. (Me.) 292.

STATE (WILSON, PROSECUTOR)

v.

CITY COUNCIL OF CITY OF CAMDEN *et al.*

(*Supreme Court of New Jersey, Feb. 27, 1899.*)

Common Council—Membership—Rights of Taxpayer—Certiorari.—This court will not, at the instance of a prosecutor whose only interest is that of a citizen and taxpayer, review, on *certiorari*, the action of a common council in seating a member who, at the time of the application for the writ, was in actual possession of the office.

(Syllabus by the Court.)

ARGUED November term, 1898, before LUDLOW and COLLINS, JJ.

George H. Peirce, for prosecutor.

H. M. Snyder, Jr., for defendant John S. Roberts.

COLLINS, J. This is an attempt on the part of a prosecutor, whose only interest is that of a citizen and taxpayer, to procure a review, on *certiorari*, of the action of the city council of Camden in seating one of its members, who, at the time of the application for the writ, was in actual possession of his office. Obviously, the purpose of the proceeding is to try the title of a *de facto* officer. This cannot be done on *certiorari*, even by a claimant to the office, much less by a stranger. *Quo warranto*, and not *certiorari*, is the only appropriate proceeding in such a case. Henry *v.* City Council of Camden, 42 N. J. Law, 335; Stites *v.* Freeholders of Cumberland, 58 N. J. Law, 340, 33 Atl. 737; Clayton *v.* Freeholders of Hudson, 60 N. J. Law, 364, 37 Atl. 725. The writ in this case is therefore dismissed, with costs.

HOLDEN

v.

CITY OF ALTON *et al.*

(*Supreme Court of Illinois, April 17, 1899.*)

Illegal Contracts for Municipal Work—Right of Taxpayer to Enjoin.*—A taxpayer of a municipality has a right to enjoin the consummation of a contract for city work awarded in violation of a statute and ordinance requiring the contract to be let to the lowest bidder; and the fact that he was the lowest bidder is immaterial in this connection.

Same—Same—Issues.—Where the sole reason for such a violation of duty was because the lowest bidder did not employ the members of a certain association and could not furnish its label, the refusal to let the contract to him is merely the imposition of a greater burden on the taxpayers, through an attempted abuse of power, and in proceedings to enjoin the consummation of such abuse of power it is unnecessary to consider whether or not any discretion in awarding the contract was left to the city or its officers.

Same—Same—Consummation of Wrong Pendente Lite.—The record did not show that the illegal contract in question had been performed, and the money paid; and no action for the consummation of such abuse of power taken after the filing of the bill could affect the power of the court to grant the relief prayed for and to compel restitution.

APPEAL by complainant from Madison county circuit court. *Reversed.*

Levi Davis, for appellant.

Henry S. Baker, Corp. Counsel, for appellees.

CARTWRIGHT, J. Charles Holden filed his bill in this case in the circuit court of Madison county against the city of Alton and the Sentinel-Democrat Printing Company, praying for an injunction restraining said defendants from carrying out a contract for the printing of bonds by said company for said city, and restraining the city

Case Stated.

*See *notes*, *ante*, p. 142 *et seq.*

from paying any money to said company, or any person or corporation other than complainant, on account of printing the said bonds under such contract. The defendants demurred to the bill for want of equity. The demurrer was sustained, and the bill dismissed, and complainant appealed.

The facts, as admitted by the demurrer, are as follows: Complainant is the owner of real and personal estate in the city of Alton, and is, and for many years has been, a taxpayer in said city. In pursuance of paragraph 94 of section 1 of article 5 of the general act for the incorporation of cities and villages, under which the city of Alton is incorporated, an ordinance had peen passed and was in force in said city providing that printing of all kinds, stationery, and blanks, and the supplies needed for the use of the city, should be let by contract to the lowest bidder, unless the amount of the contract should be less than $10. On July 18, 1898, the city comptroller advertised for sealed proposals for the printing of 92 bonds, to be issued by the city for State street paving, according to a sample to be obtained at the office of the corporation counsel; also two abstracts of record and two briefs for the appellate court, to be printed according to the rules of that court, at a price per page to be stated by the bidders. At the appointed time three sealed proposals were received by the comptroller, one of which was made by complainant. His bid was the lowest, and he offered to print the bonds for $18.25 and the abstract and briefs for 49 cents per page. The bid of the Sentinel-Democrat Printing Company was next higher, and was $23.85 for the bonds, 57 cents per page for abstracts, and 49 cents per page for briefs. The city council had before that time received and accepted a petition of a Typographical Union asking the council to prohibit the letting of any contract for city printing to, or having any city printing done in, any office which could not furnish the label of said union, and the council had directed an ordinance drawn as prayed for in the petition. The ordinance had been prepared and introduced, and laid over, under the rules of the council, until the next meeting, when

final action upon it would be taken. Complainant, who was the lowest bidder, was not a member of the Typographical Union, did not employ union labor, and could not show the union label, while the Sentinel-Democrat Printing Company did employ union labor and could furnish the union label. The comptroller and printing committee of the city council accepted complainant's bid for the abstracts and briefs for the sole reason that they were required to be printed without delay, but postponed action on the bids for the bonds solely in anticipation of the passage of this ordinance, under which they might reject complainant's bid. At the next meeting of the city council, August 9, 1898, the ordinance was passed, providing as follows: "That hereafter all city printing shall be awarded and let only to such printing houses or shops as employ union labor or can show the union label, and the city comptroller and the committee on printing are hereby directed and instructed to carry this out." After passing the ordinance, the council took up the bids, and accepted the bid of the Sentinel-Democrat Printing Company for the sole and only reason that said company employed union labor and could satisfy the requirements of the ordinance. The ordinance was approved the next day by the mayor. Complainant, whose bid was the lowest, is a printer and stationer in the city of Alton, and is an experienced, practical, and responsible printer, fully qualified to comply with his bid. When the bill was filed, nothing had been done towards printing the bonds or carrying out the contract.

In his character as a taxpayer of the city of Alton, complainant had a right to enjoin any intended misappropriation of public money by the council or officers of the city, or the payment of such money on an illegal contract or without authority of law. Littler *v.* Jayne, 124 Ill. 123, 16 N. E. 374; Adams *v.* Brenan, 177 Ill. 194, 52 N. E. 314. If the contract in question was awarded in violation of the statute of the state

Illegal Contracts for Municipal Work—Right of Taxpayer to Enjoin.

and the ordinance of the city requiring it to be let to the lowest bidder, he could sue as a taxpayer to enjoin its consummation, and his rights in that respect are not affected or abridged by the fact that he was also a bidder. The ordinance had not been approved by the mayor, and it would have been a nullity if that formality had already occurred. But it is admitted that the lowest bidder was well fitted and qualified to do the work; that no question of the qualifications of bidders was considered; that the refusal to let to the lowest bidder was not to protect the city with respect to the proper performance of the contract or in the exercise of any discretion, but that the council cast upon the taxpayers an increased burden, contrary to the provisions of the statute and ordinance, solely because it had entered into a combination, with a certain class of persons doing printing, to restrict the privilege of bidding to such class, instead of leaving it open to all citizens upon like conditions. Such a combination or agreement is in violation of common right, tends to create a monopoly, and cannot be tolerated. Adams *v.* Brenan, *supra*. There is here an unequivocal admission of an arbitrary exclusion from the privilege of contracting with the city, or laboring for it, of a portion of the citizens, for the sole reason that they are not members of an association, and this action increases the cost of the printing, to the injury of the taxpayer. It is immaterial whether there was any attempted ordinance as a basis for such action, or whether it had been approved. The statute and the ordinance required the contract to be let to the lowest bidder, and this implied equal opportunity and freedom in all who might choose to bid. The Sentinel-Democrat Printing Company could not claim to be the lowest bidder when another and lower bid was ejected, under such an arrangement, to prevent other persons from competing. Dement *v.* Rokker, 126 Ill. 174, 19 N. E. 33.

A court of equity will not review the proceedings of a city council in matters left to its discretion, where such discretion

has been exercised in good faith, and it is insisted that this case comes within that rule, and that the decree should not be disturbed for that reason. In the statute under which the ordinance was passed, the limit prescribed for the action of the city council is that the contract shall be let to the lowest bidder, and in this respect the provision is different from others which have been considered, where the contract is to be let to the lowest responsible bidder, or some other qualification is added. The advertisement stated that the contract would be awarded to the best and lowest bidder, but the additional qualification that the bidder should be the best was not within the statute or the ordinance. There may have been good reason, in the judgment of the legislature, for making a different provision as to printing, stationery, and supplies, which could be inspected and rejected on receipt, from the case of permanent improvements, where permanent injury might be done, or great public interests suffer, for want of responsibility or proper ability to perform the work. By the literal reading of the statute, no discretion is left to the city council, since it requires no discretion to determine which is the lowest bid. That is settled by a comparison of the amounts. But we will not consider the question whether any discretion is left to the city council, for the reason that it is here admitted that there was no exercise, or attempt to exercise, discretion as to the qualifications or facilities of the bidders. The lowest bidder was well qualified and able to do the work, and the refusal to award the contract to him was because he did not employ the members of a certain association and could not furnish the label of that organization. The refusal on such ground was merely the imposition of a greater burden on the taxpayers, through an attempted abuse of power.

Same—Same—Issues.

We understand from the argument for appellant that he does not insist upon that prayer of his bill the effect of which would be to compel an award of the contract to him, and we do not consider that feature of the case.

Counsel for appellees says that the contract has been per-

formed, and the money paid, and that the court should disregard the injury done to the taxpayer, for the reason that it has been fully accomplished. The record does not show that the fact stated is true, but, if it is, the action was taken after the filing of the bill, and when the court had acquired jurisdiction to prevent the wrong. No action, under such circumstances, can affect the power of the court to grant the relief prayed for and to compel restitution. There was no injunction *pendente lite*, and the defendants would not be liable for contempt for violating an order of the court, but, if a defendant acts in such a case, it is at the risk of being compelled to restore the condition existing when the court acquired jurisdiction. Lambert *v.* Alcorn, 144 Ill. 313, 33 N. E. 53.

Same—Same—Consummation of Wrong Pendente Lite.

The decree of the circuit court is reversed, and the cause is remanded, with directions to overrule the demurrer, and thereafter proceed in conformity with what is here said. Reversed and remanded.

TOWN OF KLAMATH FALLS

v.

SACHS *et al.*

(*Supreme Court of Oregon, May 29, 1899.*)

Municipal Corporations — Improvement Bonds — Authority of Trustees.— The contention that the powers vested in plaintiff (a municipal corporation) by its charter must be distinguished from those vested in its board of trustees, and that in the one case they must be exercised by the inhabitants and in the other by the board, is without merit; and if plaintiff had power to issue certain improvement bonds, its board of trustees had authority to exercise such power in its behalf.

Same—Power to Issue Negotiable Securities.*—Under a charter which provides, in substance, that all warrants drawn against the

*See notes at end of case.

Town of Klamath Falls *v.* Sachs

town creating an indebtedness in excess of a certain sum shall be void, provided, however, that the town may incur an additional indebtedness for the purpose of lighting the town and furnishing it with a water system, and issue bonds therefor, the town has, by implication, power to issue negotiable bonds for such purpose.

Bonds—Recitals — Estoppel.*—Only those recitals in municipal bonds respecting the existence of facts and the performance of the requisite conditions which are within the province of the municipal officers to ascertain and determine will estop the municipality to maintain anything to the contrary as against innocent holders.

Same—Same—Same.—The statement on the face of municipal bonds that they were issued by virtue of a certain ordinance, giving its date and full title, is such a reference thereto as to put persons dealing in them upon inquiry touching the legal purpose of the ordinance, and whether it was such a one as had the sanction of the charter in its enactment.

Same—Same—Same.—A recital on a municipal bond that it was issued in pursuance of the charter would not validate it if the ordinance providing for its issue was repugnant to a charter provision.

Same—Validity of Ordinance.—The ordinance in question was such a one as plaintiff's board of trustees had authority under the charter to adopt, and sufficient to support the bond issue, the contention that the bonds issued in accordance with its terms were in effect a bonus to be paid for the construction of the water system and a supply of water for the town being unwarranted; and it being within the power of the municipality to enter into a contract containing provisions whereby the town might eventually own the water system to the owner of which the bonds were issued, in consideration of the benefits secured to the town by the construction of the water plant and hydrants, although the charter contained no provision on the subject, except one by which the town was authorized to issue bonds to furnish itself with a water system.

Same—Recitals—Estoppel. — Where the ordinance under which municipal bonds had been issued was within the power of the board of trustees to enact, the town was estopped by the recital in the bonds to the effect that all acts and things required to be done precedent to or on the issuance of the bonds had been done and performed in regular and due manner and form as required by law, or to deny that the terms and conditions of the contract in pursuance of which they were issued had been complied with.

APPEAL by plaintiff from Klamath county circuit court. *Affirmed.*

*See notes at end of case.

Town of Klamath Falls *v.* Sachs

Case Stated.

This is a suit to enjoin the prosecution of an action commenced by Lipman Sachs against the plaintiff herein to recover upon two coupons for interest payments upon two certain bonds purporting to have been issued by it to H. V. Gates, to restrain the collection of such coupons, and to have the bonds themselves declared null and void. The bonds to which the coupons are attached are in form as follows: "For value received, the town of Klamath Falls, in the county of Klamath, state of Oregon, promises to pay to the bearer at the Chase National Bank, in the city of New York, state of New York, on the first day of September, A. D. 1915, one thousand dollars, with interest thereon at the rate of six per cent. per annum from September 1st, A. D. 1895, interest to be paid semiannually on the first days of September and March in each and every year thereafter, at the same place, on the presentation and surrender of the coupons for such interest, hereto attached, as they respectively become due. Principal and interest payable in United States gold coin of the present standard of weight and fineness. This bond is one of a series of ten bonds of one thousand dollars each, of like tenor, and even date herewith, numbered consecutively from one to ten, both numbers inclusive, issued by the town of Klamath Falls. This bond is issued by the town of Klamath Falls for the purpose of providing electric lights and water for the inhabitants of said town by and under authority of an act of the legislature of the state of Oregon, filed in the office of the secretary of state February 6th, A. D. 1893, and entitled 'An act to incorporate the town of Klamath Falls, Oregon,' * * * and by virtue of Ordinance No. 46 of said town of Klamath Falls, duly passed by the board of trustees of said town on the 6th day of April, A. D. 1895 [giving the full title of the ordinance]. It is hereby recited that all acts and things required to be done precedent to and on the issuing of this bond have been done and performed in regular and due manner and form as required by law, and that the total indebtedness of said town of Klamath Falls, including this issue of bonds, does not exceed the limit

prescribed by law; and for the prompt payment of the principal and interest hereof at maturity the full faith and credit of the said town of Klamath Falls are hereby irrevocably pledged." They are duly executed, and bear date August 7, 1895. On April 6, 1895, the plaintiff's board of trustees adopted Ordinance No. 45, providing for supplying the town and its inhabitants with electric lights and power for public and private purposes, and granting H. V. Gates, his successors and assigns, a franchise and license to construct and operate a system of electric lighting and power works in the town, contracting with him for the rental of electric lights for illuminating the town, and reserving an option to purchase the same. Ordinance No. 46, adopted at the same time, is similar in effect, except that it provides for the construction of a water system instead, and the issuance of the bonds in controversy. It is entitled "An ordinance providing for the supplying of the town of Klamath Falls, Oregon, and its inhabitants, with water for public and private purposes, and granting H. V. Gates a franchise and license to construct and operate a system of waterworks in the town of Klamath Falls, Oregon, contracting with the said H. V. Gates for the rental of fire hydrants for supplying the town of Klamath Falls, Oregon, with water, and giving the town of Klamath Falls, Oregon, an option to purchase said waterworks, and providing for payment to said H. V. Gates of ten thousand dollars in bonds of the town of Klamath Falls as a first payment on said option to purchase the said waterworks and for rentals of hydrants for the town of Klamath Falls, Oregon." It provides, in substance, so far as it is necessary to be set out for an understanding of the opinion, as follows:

"Section 1. That H. V. Gates, his successors and assigns, are granted the privilege for and during the term of ten years to construct, maintain and operate a system of waterworks in the town of Klamath Falls, for supplying the said town and inhabitants thereof with water for public and private purposes."

"Sec. 4. That the grantee shall provide a substantial engine

house, of sufficient capacity to accommodate pumps and appliances of waterworks, and such room as may be required to accommodate the electric plant to be operated in conjunction with said waterworks system."

"Sec. 6. That the grantee shall furnish and lay to the reservoir in the streets of said town, at a specified depth, not less than four thousand feet of six-inch pipe and two thousand feet of four-inch pipe, and as much more as may be deemed necessary; shall furnish ten double hydrants, and connect the same with the mains; also all necessary valves, special fittings, and valve boxes required to complete the works; the mains and fittings to be ample and capable of carrying out the provisions and intentions of this agreement, of affording the town where said pipes are laid first-class fire protection, and of sustaining a pressure of one hundred and fifty pounds to the square inch; shall furnish all mains and laterals that may from time to time be required to supply the town or its inhabitants with water: provided, that for each eight hundred feet of four inch, or larger, mains ordered by the town, there shall be one hydrant ordered, and rental paid for use of the same.

"Sec. 7. That the grantee is to keep the fire hydrants in good repair, protect same from freezing, and keep them ready at all times for instant service.

"Sec. 8. That the privilege granted to and vested in the said H. V. Gates, his successors and assigns, shall remain in full force and effect for and during the period of ten years, but subject to the right of purchase by the town; and the town of Klamath Falls rents of the grantee, for the use designated, the ten hydrants mentioned and provided for during the same period of time from the acceptance of said waterworks."

"Sec. 10. That for and in consideration of the benefits secured to the town of Klamath Falls by reason of the construction of the water plant and the use of the hydrants aforesaid, the town of Klamath Falls covenants and agrees to issue to the grantee its bonds in the sum of ten thousand

dollars, in denominations as demanded by the said grantee, said bonds to draw interest at the rate of six per cent. per annum, payable semiannually, and to be delivered to said grantee upon the completion of said water plant, and when the same has successfully stood the required tests: provided, the said grantee shall satisfactorily show that said works are free from all liens, and that all labor and materials used and furnished have been paid for.

"Sec. 11. That at the expiration of ten years from the completion of said works, and at the end of each five years thereafter, the town of Klamath Falls shall have the option to purchase and own said waterworks and appurtenances and franchises upon the following conditions, and the grantee in accepting this ordinance expressly covenants to sell and convey to the town the said waterworks and system as a whole: The said town of Klamath Falls, by resolution of its board of trustees, shall determine to purchase and own said waterworks and shall serve a certified copy of such resolution on the grantee at least six months before the time when the said town may exercise such option. The sum of money that said town shall pay for said waterworks as a whole shall be an amount which at eight per cent. interest would produce an annual income equal to the net income during the year previous to the serving of the notice of resolution, with the cost price added for any improvements or extension made during the year previous to such notice, upon which no revenue has been derived. When such purchase is made by the town, the franchise granted to Gates shall terminate. If said town shall not determine to purchase said waterworks within ten years from date of its acceptance of said works, it shall grant to the grantee a franchise, upon the same terms and conditions as herein stated, reserving the option of purchase each five years. The ten thousand dollars paid for hydrant rental shall be the first payment upon the purchase price of said waterworks, and it is agreed that, until such time as the town shall purchase, it shall own an absolute right and interest in the said

were delivered to the defendant E. R. Reames (who was then a member of the board of trustees of the town, and a stockholder in the Klamath Falls Light & Water Company), in trust, to carry out the provisions of said Ordinance No. 46, and not otherwise; that neither Gates nor his assigns ever became entitled, under the provisions of said ordinance, to receive said bonds, and that the delivery thereof to Gates was unauthorized by any act of said board. At the trial, however, it was admitted in open court that they were delivered to him by Reames; that he sold the same, but failed to account to the town for the proceeds; and that the defendant Lipman Sachs purchased said interest warrants or coupons for a valuable consideration, before maturity, without knowledge of the conditions and circumstances under which they were issued, delivered, and negotiated, except such as he is bound to take cognizance of from the face of the bonds.

It is first insisted that the powers vested in the town by the charter must be distinguished from such as are vested in the board of trustees, and that in the one case they must be exercised by the inhabitants and in the other by the board. To illustrate: It is enacted that the "town may incur an additional indebtedness of ten thousand dollars and issue bonds therefor, for the purpose of lighting the town and furnishing it with a water system"; while, on the other hand, the board is authorized "to provide for lighting the streets, roads, and alleys, and public buildings of the town, and furnishing the town with electric or other lights, and also to provide for the furnishing of water for the said town," etc. It is maintained that, as the inhabitants were incorporated as the town, they alone can exercise the power delegated by the former clause of the charter, while it is competent for the board to exercise such as is delegated by the latter. Reasoning from this hypothesis, it is urged that the board should have called an election, and submitted the question of the issuance of these bonds to a vote of the electors of the town. This concedes,

Municipal Corporations—Improvement Bonds—Authority of Trustees.

for the present purpose, that the town is authorized to issue the bonds in question, but challenges the mode and manner of their issuance. The conclusion reached is hardly a logical deduction from the premises. The electors of the town do not comprehend all the inhabitants thereof, and just why the board of trustees should be required to submit the question to a vote of the electors because the inhabitants of the town are incorporated is not quite apparent. There is no authority or direction under the charter empowering or requiring the board, before proceeding to the issuance of the bonds, to submit the question to a vote of the people; nor is there any such a limitation put upon its powers as it respects the issuance thereof. It is very true the trustees, if they had seen fit, could have submitted the question to a vote of the electors as an advisory matter for their guidance, but they were not compelled or required to do so by any provision of the charter. They are the agents of the town in the exercise of all powers accorded it by the legislature, and the town acts through them in the transaction of all public business. A corporation, unlike an individual, cannot perform its functions directly, but must do so through an agent or some intermediary instrumentality; and it is in this capacity that the board of trustees acted in the issuance of the bonds in controversy. If, therefore, the town has been clothed with the power to issue, the board has authority to proceed in the exercise thereof.

Same—Power to Issue Negotiable Securities.

It is next insisted that the language of the charter does not authorize or empower the town or its board of trustees to issue bonds nogotiable in form and character, such as were attempted to be issued in the present instance; in other words, that the power accorded to "issue bonds" is not commensurate or adequate to the purpose of issuing negotiable bonds. It has been held that the implied power of a municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it does not authorize the municipality to issue negotiable securities, capable of being sold in open

market, and thereby freed from equities that might be set up by the maker; and, further, that the power to borrow money on the credit of the municipality for general municipal purposes limits the power to borrow for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation, the presumption being that the grant of power was intended to confer the right to borrow money in anticipation of the receipt of revenue taxes, and that there is no implied power to issue negotiable securities, unimpeachable in the hands of innocent purchasers, for the money borrowed. Merrill *v.* Monticello, 138 U. S. 673, 11 Sup. Ct. 441; City of Brenham *v.* German-American Bank, 12 Sup. Ct. 559. So, in Ashuelot Nat. Bank of Keene *v.* School Dist. No. 7, Valley Co., 5 C. C. A. 468, 56 Fed. 197, it was held that there is no implied power to issue negotiable bonds from the express delegation of power and authority to borrow money to pay for the site of school houses, to erect buildings thereon, and furnish the same, dependent upon a majority vote of the qualified electors of the district. And in Merrill *v.* Monticello, *supra*, it is said by MR. JUSTICE LAMAR, speaking for the court, that: "To borrow money, and to give a bond or obligation therefor, which may be circulated in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is that the town had the power to contract a loan under certain specific restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loans. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality." These cases are mainly relied on by plaintiff in support of its position, and we do not question their soundness, but their application to the present controversy may well be doubted. In City of Cadillac *v.* Woonsocket Inst. for Savings, 7 C. C. A. 574, 58 Fed. 935, under a statute which contains, among others, the following pro-

visions, *viz.:* "For any loans lawfully made the bonds of the city may be issued, bearing a legal rate of interest. * * * When deemed necessary by the council to extend the time of payment, new bonds may be issued in the place of former bonds falling due, in such manner as merely to change but not increase the indebtedness of the city,"—it was held that bonds negotiable in form were authorized. LURTON, J., speaking for the circuit court of appeals, says: "That this contemplates, and by necessary implication authorizes, the issue of negotiable bonds, we have no doubt. The general power to issue 'bonds' must be taken to authorize 'bonds' in the usual form of such well-known commercial obligations. That usual form embodies a contract and obligation negotiable in its terms." He continues: "The case of City of Brenham *v.* German-American Bank, *supra*, has no bearing upon this question. Nothing more is there decided than that an act empowering the city to borrow, for general purposes, not exceeding $15,000, on the credit of the city, did not authorize the issuance of negotiable obligations for the money so borrowed. Here the power to issue obligations, by necessary implication, in the usual commercial form of 'bonds,' is expressly given. But one meaning can be fairly deduced from the terms of the act. The question now presented was not discussed in the Brenham Case, and we have no doubt whatever as to the conclusion we have announced." The doctrine of this case has been expressly followed in several subsequent decisions by the federal courts, all of which distinguish Merrill *v.* Monticello, *supra*, and City of Brenham *v.* German-American Bank, *supra*. In Ashley *v.* Board, 8 C. C. A. 455, 60 Fed. 55, power was given to issue bonds bearing interest, running for a long period of time; and, it appearing on the face of the act that they might be put on the market and sold, it was held that, by strong implication, bonds negotiable in form were intended to be and might lawfully be issued and sold, under the authority granted. In West Plains Tp. *v.* Sage, 16 C. C. A. 553, 69 Fed. 943, it was held that a statute providing

"that every county, every city of the first, second and third class, the board of education of any city, every township, and every school district, is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds, with semiannual interest coupons attached, in payment for any sums so compromised," by implication authorized the township to issue new bonds, without any restriction as to their negotiability, and that the grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. And in Howard *v.* Kiowa Co., 73 Fed. 406, it was concluded that statutory power to issue bonds includes power to make them negotiable, unless restricted by positive enactment. The learned judge in this case cites with approval the federal authorities above referred to. The implied power is largely—perhaps exclusively—a matter of legislative intendment, and we are impressed that a reasonable construction of the charter providing for the issuing of these bonds empowers the town, through its board of trustees, to issue and put upon the market bonds negotiable in form, and which would not be subject to equities in favor of the town in the hands of innocent purchasers. It will be noted that the first clause of section 11 of the charter provides that the town shall never borrow money, contract debts, or loan its credit to a greater amount than 5 per cent. of its taxable property, and that all warrants drawn against the town creating an indebtedness in excess of that sum shall be absolutely void, and it shall be so stated upon each and every warrant so drawn. Thus it will be seen that the intendment of the charter is that the ordinary warrants may be issued in liquidation of the town's indebtedness, within the limit designated; but, if it exceeds the limit, then that the warrants shall be invalid, and the fact shall be indicated upon the face thereof, which would impart direct notice and information of their illegality to every person dealing with

them. A subsequent clause empowers the town to issue another and a different kind of vouchers or obligations "for the purpose of lighting the town and furnishing it with a water system." For the additional indebtedness thus incurred it may "issue bonds." Manifestly, a distinction was intended to be made between the two kinds of vouchers or obligations, and it was designed, no doubt, that one should possess more of value to the holder than the other, else why should the different kinds of obligations be designated in the self-same section of the charter? Now, a nonnegotiable bond is no more serviceable to the holder than the ordinary warrant, the usual voucher issued in liquidation of ordinary expenditures of the municipality; and, if we would endow it with an enlarged value, the only manner by which it could be done is to give it negotiability, so as to impart to it the quality of commercial paper, and thereby cut off equities in the hands of innocent holders for value; so that, if we must make a distinction, it must be that which distinguishes the ordinary warrant, or nonnegotiable, from the negotiable municipal bond, which cuts off equities. We conclude, therefore, that the bonds authorized by the charter are those possessing the greater commercial value, issued in the usual commercial form, with protection to innocent purchasers. THAYER, J., who rendered the opinion in Ashuelot Nat. Bank of Keene *v.* School Dist. No. 7, Valley Co., *supra*, wrote a concurring opinion in West Plains Tp. *v.* Sage, *supra*, basing the power to issue the negotiable form and quality of bonds upon a construction of the statute, wherein, considering the intent of the legislature, he concluded that the language of the act was adequate to the purpose, notwithstanding the decisions in Merrill *v.* Monticello, *supra*, and Brenham *v.* Bank, *supra*. To the same purpose is Ashley *v.* Board, *supra*. So it is in the case at bar. The character of the bonds authorized to be issued is established by legislative intendment, and it was competent to give them the quality of negotiability.

The bonds having recited that they were issued in pursuance of the provisions of the charter and Ordinance No.

46, it is vigorously contended that the purchaser is bound to take cognizance of the provisions both of the charter and the ordinance, and, in that view, it is further maintained that the ordinance is such as the board of trustees had no warrant, under the charter, to adopt, in that it does not provide for lighting the town and furnishing it with a water system; hence that the bonds were issued for a purpose not contemplated by the charter, and therefore void in the hands of all holders thereof. Answering these propositions, defendants assert that, the charter having invested the board of trustees with power to issue bonds, and the bonds themselves bearing upon their face recitals to the effect that they were issued by authority of the charter and Ordinance No. 46, and that all acts and things required to be done precedent to and on the issuance thereof have been done and performed in regular and due manner and form, as required by law, the town is effectually estopped to controvert the truth of such recitals as against a *bona fide* holder. In legal effect, adequate recitals contained in negotiable municipal bonds are equivalent to a representation, or warranty, or certificate on the part of the officers that everything necessary by law to be done has been done, and every fact necessary by law to have existed did exist, to make them legal and binding. It is well understood, of course, that such recitals do not cover matters of law, as all parties are equally bound to know the law, so that a certificate reciting actual facts, and that thereby the bonds were conformable to law, when, judicially speaking, they are not, does not work an estoppel upon the municipality to claim the protection of the law; otherwise, it would be in the power of every municipal body, whether it had the authority or not, to usurp it by declaring that its assumption was within the law. This would be an exercise of legislative power, and would put corporate bodies above the law itself. The estoppel, therefore, extends only to matters of fact, and the statement thereof must be qualified and circumscribed so as to comprise such only as the officers intrusted with the power of issuing the

Bonds—Recitals—Estoppel.

bonds have express or implied authority to ascertain and determine touching their existence. In such a case, MR. JUSTICE MATTHEWS, in Dixon Co. *v.* Field, 111 U. S. 83, 4 Sup. Ct. 315, says: "The meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained or determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency." The gist of the rule is aptly stated by MR. JUSTICE STRONG in Town of Coloma *v.* Eaves, 92 U. S. 484, as follows: "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent had been complied with, their recital that it has been, made in the bonds issued by them, and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal." Hence it may be stated, as a general rule, that recitals in bonds which functionaries of a municipality have been empowered to issue, respecting the existence of specified facts, and the performance of the requisite conditions which are within their appropriate functions or province to ascertain and determine, will estop the municipality to assert or maintain anything to the contrary as against the claim of innocent holders. We have little doubt but that the statement on the face of the bonds that they were issued by virtue of Ordinance No. 46, giving the date and the full title of such ordinance, is such an apposite and significant reference thereto as to put persons dealing in them upon inquiry touching the provisions and exact legal purpose of the ordinance, and whether it was such a one as had the sanction of the charter in its enactment. The trend of authority, so far as we have been able to discover, is to that effect. Risley *v.* Village of Howell, 57 Fed. 544; Hackett *v.* Ottawa, 99 U. S. 86; Barnett *v.* Denison, 145 U. S. 135, 12 Sup. Ct. 819. Such being the legal effect of the

Same—Same—Same.

statement or reference to the ordinance, the recital that the bonds were issued in pursuance of the charter could not validate it, or give it effect, if void or inoperative. This would be equivalent to saying: "Indeed, you have given us the true condition of the ordinance, and it is such that the town had no authority to adopt; but, nevertheless, you assert upon the face of the bonds that all was done in pursuance of the charter, hence that we are at liberty to assume, in utter disregard of the truth, that an ordinance was not only adopted, but that, in legal contemplation, it was amply sufficient to authorize and support the bonds, and that we may therefore purchase in absolute reliance on their validity." That would be an anomaly, and would result in making a void ordinance, of the condition of which all parties have had ample notice, valid, by the simple assertion that it was adopted in accordance with law.

Same—Same—Same.

This brings us to a consideration of the ordinance itself, and we are to determine whether it is such a one as the board of trustees was empowered to adopt, and such as will support the bond issue. It is urged that the bonds awarded are, in effect, a bonus to be paid to Gates for constructing the water system and supplying the town with water. A careful analysis of the ordinance will suffice to determine this question. In the first place, the town grants to Gates, his successors or assigns, a privilege to construct and maintain a system of waterworks for supplying it and its inhabitants with water. Primarily, this privilege is limited to 10 years. Gates, by an acceptance of the ordinance, agrees and undertakes to build, construct, and maintain the system in accordance with particular provisions of the ordinance, and is required to maintain it during the full period for which the privilege is granted. Thereupon it is provided that the town shall have the option to purchase the system at a certain fixed rate, capable of being definitely determined at any time it may desire to conclude the purchase. In consideration of the option, it is

Same—Validity of Ordinance.

stipulated that the town shall execute and deliver to Gates its bonds for the sum of $10,000, and, whenever it shall conclude the purchase, these bonds are to be considered a first payment upon the purchase price. The ordinance provides that the town shall have an interest in the waterworks to the extent of $10,000, but that Gates and his successors and assigns shall also retain an interest therein until the town has completed the purchase, upon the consummation of which the franchise shall terminate. Gates is to receive the rents and profits of the water service to the inhabitants, and even to the town, except for 10 hydrants, which he is required to furnish and maintain in part consideration for the franchise until the same is terminated; and provision is made for the renewal of the franchise, which contemplates as well a renewal of the option from time to time for a period of five years, so that the parties shall be continued in practically the same relations. These are, in brief, the principal characteristics of the ordinance, which became effective as a contract when accepted by the grantee in the manner indicated. Whatever might be said of the ordinance, it does not provide for a bonus to Gates, in the sense that it is a mere gratuity, as he has contracted for and has given something of value to the town in return for the bonds and his limited franchise. But the cardinal inquiry is whether what has been done has culminated in furnishing the town with a water system, within the meaning of section 11 of the charter. It is argued that it was the purpose and intent of the charter that the town should be or become the absolute owner of a perfect water system, freed from all liens or incumbrances which may have effect as such, either directly or indirectly; in other words, that the town is empowered merely to purchase and own a perfect, unincumbered water system, at a cost not to exceed $10,000. The effect of section 11 is that the town shall not create an indebtedness exceeding 5 per cent. of the taxable property; but, for the purpose of lighting the town and furnishing it with a water system, it is authorized to incur an additional

indebtedness of $10,000, which latter amount we interpret not to constitute a limitation upon the cost of the water system; and it would be adequate for the town to contract or provide for the construction of a system which might cost a sum equal to 5 per cent. of the taxable property in excess thereof, provided there was no other indebtedness of the town, and it could issue therefor $10,000 in bonds, and its warrants for the balance. Thus far the way seems perfectly clear. It must be admitted that the town has not become the absolute owner of the water system; but it has an interest therein to the extent of $10,000, and, under the ordinance, it may retain this at all events, and may eventually become the owner of the whole by a supposed additional expenditure. We find from the testimony that the entire system, including the electric light plant, cost Gates something like $17,000. But this is not the measure of the ultimate cost to the town. It may be more, and yet it may be less. The assessments of taxable property in 1895 exceeded $125,000, so that, if the board had incurred a liability or obligation to the full amount of the cost to Gates, it would exceed but slightly the limitation under the charter unless the town had other outstanding obligations. The board, however, has only incurred a present obligation of $10,000, and at the end of 10 years it is quite probable it can assume the additional obligation, if it does not provide a fund in the meantime for the payment of the bonds in full or in part, without overreaching the charter limitation of indebtedness. Careful provisions are made whereby the town may eventually own the system, and it would seem the legitimate intendment of the ordinance is that the contract thereby consummated with the assent of Gates should, in good faith, be carried out in every detail, and fully and conscientiously executed. The ordinance has so provided that neither Gates nor his successors or assigns can ever acquire the absolute franchise without the assent of the town (and without the franchise they could not operate the system). Neither can the town be deprived of its right

to finally acquire the entire ownership of the system without an abandonment thereof. The town entered *bona fide* into a contract, and we cannot say that it is unreasonable or unbusinesslike, for that is largely a legislative matter for the board of trustees, whereby, upon the observance of its terms and conditions, it might eventually acquire the water system, and, apparently, without the necessity of exceeding the limit of indebtedness as set by the charter; and we are very strongly impressed that it is such a one as the board had the power to make, looking to the acquirement of the water system, and, while it is yet executory in its nature, and the town has not become the absolute owner, such is the legitimate intendment that it shall at a future date become such owner; hence, we hold that it has not exceeded its powers in the premises.

We have reasoned this case so far as if the board of trustees had been dealing with the water system alone, because it has seemed that we might be better understood. The plaintiff argued that it was necessary, under the charter, that the board should provide for lighting the town, and at the same time furnish it with a water system, thus combining the two, and that it was incompetent for the town to provide for the one without the other. This argument is not well founded, as it is apparent that the intendment of the charter is that the board might provide for one or the other separately, or for both at the same time; but, if we are wrong in this interpretation, we find that the board has in fact undertaken to provide for a combination of both. While the ordinance providing for the lighting of the town is not referred to in the bonds, yet the matter of constructing an electric system in conjunction with the waterworks is referred to in Ordinance No. 46 in such manner as it may be fairly concluded that the purpose of the board was to furnish the town with a system for lighting, as well as for a water supply. Ordinance No. 46 being, as we have heretofore ascertained, within the power of the

Same—Recitals—Estoppel.

board of trustees to enact, the town is estopped by the recital in the bonds to the effect that all acts and things required to be done precedent to and on the issuance thereof have been done and performed in regular and due manner and form, as required by law, to deny that Gates or his assigns have not complied with the terms and conditions of his undertaking, or that he has not fully completed the system, as required by the ordinance.

The issue is raised that the bonds were delivered without the authority of the board of trustees. But touching this there is no evidence in the record showing the manner of their delivery by Reames. The complaint alleges no fraud in the delivery, but simply that the bonds were turned over to Gates contrary to the conditions of the ordinance. But the burden of proof regarding this matter was with the plaintiff to establish, and, not having done so, we must conclude that the fact is otherwise than as alleged, and that the bonds came rightfully into the hands of Gates. These considerations affirm the decree of the court below, and it is so ordered.

NOTES.

Municipal Bonds—Implied Power to Issue.—Where the power to borrow money has been expressly granted to a municipality, it has by implication the power to issue negotiable bonds to the lender. West Plains Tp. *v.* Sage, 16 C. C. A. 553; Howard *v.* Kiowa County (C. C.) 73 F. 395; Rogers *v.* Burlington, 3 Wall. (U. S.) 654; Milner *v.* Pensacola, 2 Wood (U. S.) 637; Mercer Co. *v.* Hacket, 1 Wall. (U. S.) 83; Hitchcock *v.* Galveston, 2 Wood (U. S.) 272; Seybert *v.* Pittsburg, 1 Wall. (U. S.) 272; Com. *v.* Allegheny Co., 37 Pa. St. 241; German Am. Bank *v.* Brenham, 35 Fed. Rep. 185; Galena *v.* Corwith, 48 Ill. 423, 95 Am. Dec. 557; Mayor, etc., of Griffin *v.* Inman, 57 Ga. 370; Adams *v.* Rome, 59 Ga. 765; Tucker *v.* Raleigh, 75 N. Car. 267; Mayor, etc., of Vicksburgh *v.* Lombard, 51 Miss. 125; De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 647.

Same—Recitals—Estoppel.—It is a well-established doctrine in the United States courts, that when suits are brought against municipalities upon bonds issued by them which have passed into the hand of *bona-fide* holders for value, and the bonds contain recitals to the

Notes

effect that certain conditions or specifications have been complied with which are requisite to establish the validity of the bonds, and of which the officers issuing the bonds are made judges, the municipality is estopped to deny the truth of the facts so recited. Coler *v.* Dwight School Tp. of Richland County (N. D.) 55 N. W. 587; Township of Washington *v.* Coler (Cir. Ct. App.), 51 Fed. 362, 2 C. C. A. 272, 4 U. S. App. 622; Knox Co. *v.* Aspinwall, 21 How. 439; Moran *v.* Miami Co., 2 Black. 722; Supervisors *v.* Schenck, 5 Wall. 722; Rogers *v.* Burlington, 3 Wall. 654; Woods *v.* Lawrence Co., 1 Black. 386; Mercer Co. *v.* Hacket, 1 Wall. 83; Meyer *v.* Muscatine, 1 Wall. 385; Bissell *v.* Jeffersonville, 24 How. 287; Gelpeke *v.* Dubuque, 1 Wall. 175; Pendleton Co. *v.* Amy, 18 Wall. 297; St. Joseph Township *v.* Rogers, 16 Wall. 644; Grand Chute *v.* Winegar, 15 Wall. 572; Coloma *v.* Eaves, 92 U. S. 484; Randolph Co. *v.* Post, 93 U. S. 502; Leavenworth Co. *v.* Barnes, 94 U. S. 70; Douglass Co. *v.* Bolles, 94 U. S. 104; Commis. of Johnson Co. *v.* Thayer, 94 U. S. 631; Cass Co. *v.* Johnson, 95 U. S. 360; Daviess Co. *v.* Huidekoper, 98 U. S. 98; Nauvoo *v.* Ritter, 97 U. S. 389; Venice *v.* Murdock, 92 U. S. 494; Anthony *v.* Gasper Co., 101 U. S. 693; Warren *v.* Marcy, 97 U. S. 96; Hackett *v.* Ottawa, 99 U. S. 66; San Antonio *v.* Mehaffey, 96 U. S. 312; Lyons *v.* Munson, 99 U. S. 684; Supervisors *v.* Galbraith, 99 U. S. 212; Menasha *v.* Hazard, 101 U. S. 126, 2 Am. & Eng. R. Cas. 571; Pompton *v.* Cooper Union, 101 U. S. 196; Douglass *v.* Pike Co., 101 U. S. 677; Darlington *v.* Jackson Co., 101 U. S. 688; Foote *v.* Pike Co., 101 U. S. 688; Roberts *v.* Bolles, 101 U. S. 119; Dodge *v.* Platte Co., 2 Am. & Eng. R. Cas. 583; Bonham *v.* Needles, 2 Am. & Eng. R. Cas. 642; Walnut *v.* Wade, 3 Am. & Eng. R. Cas. 36; Hopper *v.* Covington, 4 Am. & Eng. R. Cas. 251; Cagwin *v.* Hancock, 5 Am. & Eng. R. Cas. 150; Clay Co. *v.* Society for Savings, 5 Am. & Eng. R. Cas. 170; Burr *v.* Charlton Co., 6 Am. & Eng. R. Cas. 584; Moultrie Co. *v.* Fairfield, 7 Am. & Eng. R. Cas. 194; Pana *v.* Bowler, 12 Am. & Eng. R. Cas. 563; American L. I. Co. *v.* Bruce, 12 Am. & Eng. R. Cas. 610; Lewis *v.* Commissioners of Barbour Co., 12 Am. & Eng. R. Cas. 615; Northern Bank of Toledo *v.* Trustees, 110 U. S. 608, 15 Am. & Eng. R. Cas. 575; Dallas Co. *v.* McKenzie, 110 U. S. 686, 15 Am. & Eng. R. Cas. 622.

Same—When Recitals Do Not Estop the Municipality.—But when it is not within the general scope of the authority of the officers issuing the bonds to determine whether or not the particular condition has been complied with, recitals that the bonds have been duly issued will not estop the municipality to set up their invalidity. Dixon Co. *v.* Field, 4 S. Ct. 315, 111 U. S. 83; Hedges *v.* Dixon County, 14 S. Ct. 71, 150 U. S. 182; Floyd Acceptances, 7 Wall. 666; Marsh *v.* Fulton Co., 10 Wall. 676; Gould *v.* Sterling, 23 N. Y. 464;

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Starin *v.* Genoa, 23 N. Y. 452; People *v.* Mead, 36 N. Y. 224; Treadwell *v.* Commissioners, 11 Ohio St. 183; Clark *v.* Des Moines, 19 Iowa, 199; De Voss *v.* Richmond, 18 Gratt. (Va.) 338, 98 Am. Dec. 647; Cagwin *v.* Hancock, 5 Am. & Eng. R. Cas. 150; Buchanan *v.* Litchfield, 102 U. S. 278; National Bank *v.* Porter Township, 110 U. S. 608; Dixon Co. *v.* Field, 111 U. S. 83, 15 Am. & Eng. R. Cas. 595.

CITY OF MINNEAPOLIS

v.

OLSON *et al.*

(*Supreme Court of Minnesota, April 7, 1899.*)

Intoxicating Liquors—License—Validity of Penal Bond.—The city of Minneapolis has no authority, under section 2026, Gen. St. 1894, to take from an applicant for a liquor license a bond running to the city as obligee, but the bond provided for in that section must run to the state. The city took such a bond, in the penal sum of $2,000, running to itself, conditioned as provided in said section, and conditioned further that the principal obligor therein "will comply with all the provisions of the city ordinance relating to the licensing of the sale of intoxicating liquors." The license was issued. The licensee committed a breach of the ordinance, was convicted and fined therefor, and paid the fine. Thereupon this action was brought to recover the penalty of the bond. *Held*, the city had no authority, under its charter, to take such a penal bond, and the action cannot be maintained.

(Syllabus by the Court.)

APPEAL by defendants from Hennepin county district court. *Reversed.*

Henry J. Gjertsen, *Brooks & Hendrix*, and *Merrick & Merrick*, for appellants.

Frank Healy and *L. A. Dunn*, for respondent.

CANTY, J. The defendant Olson applied to the city council of Minneapolis for a license to sell intoxicating liquors

*See notes at end of case.

at a designated place in that city. With his application, he presented a bond executed by himself as principal, and the other two defendants as sureties. The bond is in the penal sum of $2,000 runs to the city as obligee, and is conditioned as follows: "Whereas, Alfred Olson, principal in this bond, has duly applied to the city council of said city for license to sell intoxicating liquors in said city, and, if so licensed, he will not sell or otherwise dispose of any intoxicating liquors at any place other than the room named in such license, nor on the Sabbath, nor on any general or special election day, and that he will keep a quiet and orderly house, and not permit gambling, with cards, or with any other means or device, for money or its representative, or any other thing of value, in the house or place of business of said Alfred Olson, and will not sell, barter, give, or otherwise furnish or dispose of such liquors to any minor person, or to any pupil or student in any public school, academy, seminary, or other institution of learning, nor to any intemperate person nor habitual drunkard, and comply with all the provisions of the city ordinance relating to the licensing of the sale of intoxicating liquors, then this obligation to be void, otherwise of force." This bond, with a proper affidavit and application, was filed with the city clerk; and the city council approved it, and ordered that a license issue on it to Olson for one year from July 1, 1897, on payment of $1,000 license fee, which he paid into the city treasury, and thereupon the license was issued. Thereafter he kept his saloon open on Sunday, November 7, 1897, contrary to the city ordinance, was arrested on a warrant, tried and convicted of that charge in the municipal court, and sentenced to pay a fine of $50, which he paid; and his license was also declared forfeited. This action is brought to recover $2,000, the penalty named in the bond. The defendants demurred to the complaint on the ground that it does not state a cause of action, and appeal from an order overruling the demurrer.

It will be observed that this action can be maintained only

on the theory that this is a penal bond, and the action is for the recovery of the penalty. Appellants contend that the city had no authority to take any such bond; that the bond provided for in section 2026, Gen. St. 1894, should run to the state; and that the city is not authorized, by its charter or any other statute, to take such a bond running to itself. It will be observed that the conditions of this bond are the same as those prescribed by section 2026, except that one more condition is added. The bond is conditioned that the principal obligor will "comply with all the provisions of the city ordinance relating to the licensing of the sale of intoxicating liquors." It was settled by Village of St. James *v.* Hingtgen, 47 Minn. 521, 50 N. W. 700, that the bond provided for in section 2026 must run to the state as obligee, and that the village had no authority under that section to take such a bond running to itself. If this is true as to the village, it is equally true as to the city. It was there said: "Under the statute last referred to, counties, cities, and villages are still authorized to issue licenses; but the provision in relation to the bond is general, applicable to all alike, and there is nothing in this statute modifying the general rule, or from which it can be fairly implied that the bond should run to the separate municipality instead of the state." This decision is in line with State *v.* Peterson, 38 Minn. 143, 36 N. W. 443, where it is held that chapters 5, 6, 81, Gen. Laws 1887, "are complete in themselves." The tenor of that decision is that these acts constitute a license law, wholly independent of, and separate and apart from, the different city charters. Speaking for myself alone, I would say that I have always been of the opinion that these acts were intended largely as modifications of, and amendments to, the different city and village charters; and this is especially evident from a reading of sections 1 and 2 of chapter 5 (sections 2022, 2023, Gen. St. 1894.) But it has always been held otherwise, and to overrule the decisions now would result in confusion. Then we cannot hold that section 2026 author-

ized the city to take in its own name the bond therein provided for. Our attention has not been called to any provision of the city charter which, in our opinion, authorizes the city to take any such a bond. Respondent cites section 5 of chapter 4 of the city charter, which provides: "The city council shall have full power and authority to make, ordain * * * all such ordinances for the government and good order of the city, for the suppression of vice and intemperance and for the prevention of crime, as it shall deem expedient, and in and by the same to declare and impose penalties and punishments, and enforce the same. * * * And for these purposes said city council shall have authority by such ordinances: First, to license and regulate * * * all persons vending, dealing in or disposing of spirituous, vinous, fermented or malt liquors." Then follow 48 other specifications of powers granted to the city council. Section 6 provides that "the city council may impose punishment for any breach of any ordinance of the city to the extent of a fine not exceeding one hundred dollars and imprisonment in the city prison or county jail not exceeding ninety days." The contention seems to be that, while the "punishments" mentioned in section 5 are limited to a fine not exceeding $100 for each breach of the ordinance, the "penalties" mentioned are unlimited and therefore the city council can, for the purpose of enforcing its ordinances, impose any amount of penalty it sees fit. We cannot so hold. The authority to impose penalties, and especially excessive penalties, must be strictly construed. The utmost which these two sections authorize is the imposition of a penalty of $100 in lieu of a fine of that amount. Whether, under the general powers granted by the charter, the council could require a bond in the sum of $2,000 to secure the payment of all such fines and costs as would be imposed for violation of the ordinances, and whether this is such a bond, we need not consider. No fine or costs remain unpaid in this case, but the city is attempting to enforce this bond as a purely penal bond. In

State (Schlachter, Prosecutor) *v.* Stokes, Treasurer

our opinion, the city has no authority to take or enforce any such bond. The order overruling the demurrer is reversed.

NOTES.

Intoxicating Liquors—Bonds.—In Thomas *v.* Hinkley, 19 Neb. 324, it was held that the bond of a retail liquor dealer might be made payable to the village instead of the state. *Following* Huffman *v.* Kopplekom, 8 Neb. 344.

See also Tripp *v.* Norton, 10 R. I. 105; Van Deusen *v.* Hayward, 17 Wend. (N. Y.) 67; Ring *v.* Gibbs, 26 Wend. (N. Y.) 502; Redpath *v.* Nottingham, 5 Blackf. (Ind.) 267.

Same—Same—Amount.—A clause in a city charter authorizing it to "license, tax, regulate, and restrain bar-rooms and drinking-shops" empowers the city to require of keepers of bar-rooms, before granting them license, bonds to observe and obey all city ordinances relating to bar-rooms, although the bond may be conditioned in a penal sum larger than the fine which the city is authorized to impose for breach of its ordinances. *In re* Schneider (Ore.), 9 Am. & Eng. Corp. Cas. 550.

STATE (SCHLACHTER, PROSECUTOR)

v.

STOKES, TREASURER.

STATE (TERRY, PROSECUTOR) *v.* SAME.

(*Supreme Court of New Jersey, June 7, 1899.*)

Power to Grant Liquor Licenses—Construction of Charter.*—Section 10 of the city charter of the city of Millville (P. L. 1866, pp. 119, 120) confers no power upon the common council to grant licenses for the sale of fermented or intoxicating liquors in that city, and confers no authority to pass ordinances for the imposition of penalties for the sales of such liquors without license.

Same—Same.—A provision in "a city charter conferring power upon the common council to pass ordinances for preserving peace and good order," does not authorize the enactment of ordinances to

*See Brown *v.* Town of Social Circle, 1 Mun. Corp. Cas. 411, and *notes* 412 *et seq.*

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license the sale of fermented or intoxicating liquors, or to impose penalties for the sale of such liquors without a license.

Minutes of Proceedings before Magistrate.—Convictions in summary proceedings under a special power, given to a magistrate, must show everything necessary to such conviction.

(Syllabus by the Court.)

CERTIORARI by defendant. *Conviction set aside.*

Argued November term, 1898, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Thomas W. Trenchard and *John W. Wescott*, for prosecutors.

Martin W. Lane, for defendant.

LIPPINCOTT, J. Five convictions of the prosecutor George Schlachter, in cases each with the same title, are before the court for review on *certiorari*. There is also one conviction against the prosecutor Ion E. Terry under review by *certiorari*. All the cases can be decided in one opinion. The several convictions against Schlachter were had before the Mayor of Millville, sitting as a magistrate, under the statute, for the sale of beer, porter, strong cider, or other intoxicating or fermented liquors, in the city of Millville, without license, on the 28th day of May, 1897, again on the 12th day of June, 1897, again on February 3, 1898, and again on February 23, 1898, respectively, in violation of the provisions of Ordinance No. 24, § 1, of that city, entitled "An ordinance in relation to the sale of spirituous, fermented, or intoxicating liquors." The first section of this ordinance, among other things, provides that it shall not be lawful for any person or persons, without license first had and obtained from the common council of said city, to sell or otherwise dispose of any porter, ale, lager beer, strong beer, cider, or other fermented liquor of any kind in any quantity or quantities whatsoever, and for so offending against the ordinance, or either of its provisions, the said person or persons shall, on conviction thereof before the mayor of said city, or any justice of the peace of said city,

Case Stated.

forfeit and pay the sum of $20, with costs of suit; said fine and costs of suit to be recovered in an action of debt in the name of the treasurer of the city, to be paid to the treasurer for the use of the city. The proceedings under the ordinance, under a special power given to the mayor, are summary, in whatever form they may be instituted, and the record must formally show everything necessary to constitute a legal conviction. Keeler *v.* Milledge, 24 N. J. Law, 142; Doughty *v.* Conover, 42 N. J. Law, 193; Hankinson *v.* City of Trenton, 51 N. J. Law, 495, 17 Atl. 1083; Salter *v.* City of Bayonne, 59 N. J. Law, 128, 36 Atl. 667. In this case there is no conviction whatever. There appears to be a minute of the steps taken in the proceeding from the complaint to the hearing and the trial, with dates, and at the trial the names of the witnesses, with a short summary of the evidence given by each witness. In the case of the alleged sale on May 28, 1897, the mayor adds to this minute or docket: "After hearing the evidence of the witnesses that they had bought and paid for it in this city, I rendered a verdict in behalf of the plaintiff twenty dollars fine and costs." In the alleged sale of February 23, 1898, the following is added to the minute, or docket: "I render the following judgment: That Edward H. Stokes, treasurer of the city of Millville, etc., shall recover from the defendant, George Schlachter, the sum of twenty dollars, and eight dollars and sixteen cents costs of suit, for selling beer without license first had and obtained from the city council of the city of Millville, to one Jane Adams." Again, as to alleged sale of February 3, 1898, to the minute or docket there is added: "After the argument by both counsel for defendant and plaintiff, I rendered the following: Gave judgment that the plaintiff shall recover of the defendant, George Schlachter, the sum of twenty dollars ($20), and six dollars and seventy cents costs of suit, for the selling of beer without license first had and obtained from the common council of the city of Millville, to one William Wynocker." Similar entries are made at the end of the minute or

Minutes of Proceedings before Magistrate.

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docket of the proceedings of the two alleged sales of June 12th. These are not convictions at all of any offenses under the ordinance, and none of them contain the essential elements of formal convictions under the authorities cited. There are none of them the formal convictions required in summary proceedings of this character. Buck *v.* Danzenbacker, 37 N. J. Law, 359. But there is another error which is fundamental in these proceedings. This ordinance must be founded on legislative authority to the common council of the city of Millville to enact it, otherwise it is void. Upon examination of the city charter of Millville, it reveals no authority to enact such an ordinance. The only section of the charter to which reference is made authorizing such an ordinance is section 10 (P. L. 1866, pp. 119, 120), which provides "that it shall and may be lawful for the common council of said city to pass all ordinances * * * for the more effectual suppression of immorality; for preserving peace and good order," etc. Under this provision of the charter the common council had no power to provide for the licensing of places for the sale of these liquors, or to provide ordinances against such sales, and impose penalties for the violation thereof. Buck *v.* State, 61 N. J. Law, 525, 39 Atl. 919. In the case of Ion E. Terry, prosecutor, against the defendants, the same principles are applicable. It may be added that these summary proceedings are reviewable by *certiorari*. The conviction in each of these cases must be set aside, with costs to the prosecutor in each case.

Power to Grant Liquor Licenses—Construction of Charter.

Same—Same.

SEARCY

v.

CITY OF LAWRENCEBURG.

(*Court of Appeals of Kentucky, April 13, 1899.*)

Power to Accept Notes for License Fees.*—A city of the fifth class may accept notes for license fees.

APPEAL by defendant from Anderson county circuit court. *Affirmed.*

L. W. McKee, for appellant.

F. R. Feland, for appellee.

WHITE, J. This is an action brought by appellee, city of Lawrenceburg, upon a note executed for license to sell spiritous, vinous, and malt liquors by retail. An answer was filed, admitting the execution of the note and granting the license, but it is alleged that all this was done by appellee's council without authority of law, and is *ultra vires*, and void, and the note is likewise null and void. The court sustained a demurrer to this answer, and, appellant failing to amend, judgment was rendered, and from that judgment this appeal is prosecuted.

Lawrenceburg is a city of the fifth class. The precise question here presented was decided by this court in the case of City of Fulton *v.* Blythe, 30 S. W. 1018. It was there held that a city of the fifth class, if it so desired, might accept notes for license fees, and that these notes were valid. The judgment of the circuit court, being in conformity with that opinion, was not error, and is affirmed.

NOTE.

Notes in Payment of License Fees.—That a Kentucky city of the fifth class may take a note in part payment for a liquor license, see City of Fulton *v.* Blythe (Ky.), 30 S. W. 1018. But in Zielke *v.* State, 42 Neb. 750, 60 N. W. 1010, it was held that there was no authority to accept notes in payment of license fees.

*See note at end of case.

SILVER

v.

MAYOR, ETC., OF SPARTA.

(*Supreme Court of Georgia, April 21, 1899.*)

Licenses—Discrimination in Charges—Right to Question.*—The fact that a municipal corporation, after having granted to a particular person, for a specified sum, a license to sell spirituous liquors for a designated year, issued to another person a like license, covering the same period, for a smaller consideration, does not give to the former any right of action against the municipality; nor has he, as a dealer, any concern with the transaction between the corporate authorities and the second licensee, or, as such, any right, for any reason, to cancel or set aside any contract growing out of such transaction. This is true, although the transaction in question may have been unlawful, irregular, and have resulted in injury to the business of the first licensee.

(Syllabus by the Court.)

ERROR by plaintiff from Hancock county superior court. *Affirmed.*

Chas. A. Picquet, for plaintiff in error.

R. H. Lewis, for defendant in error.

LITTLE, J. The plaintiff in error brought suit in the superior court of Hancock county against the mayor and aldermen of the town of Sparta, making, substantially, the following allegations: That the defendant is indebted to her in the sum of $12,500, damages, for that in December, 1896, one Mandel, who had been theretofore conducting the business of retailing spirituous liquors in the town of Sparta proposed to petitioner that the latter purchase a certain quantity of spirituous liquors, which would remain in his store after the expiration of his license, said Mandel expressing his intention to leave Sparta and go into business else-

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*See notes at end of case.

where; that prior to that time petitioner's husband had been engaged in the same business in said town, and, believing the statement of Mandel, an agent of petitioner accepted said proposition; that about the last of December petitioner was informed, by an officer of the corporation, that the corporation would not issue a license to one of the Mandels to sell liquor during the year 1897, that Mandel did not have the sum of $4,000, which was the amount the mayor and aldermen had fixed for said license, and that they would not accept an offer previously made by Mandel to convey to the mayor and aldermen a tract of land, and pay such sum in addition thereto as would aggregate $4,000 for said license, if petitioner would purchase a license from the corporation and pay the sum of $4,000 therefor, but that the corporation could not issue an exclusive license, as the same would be illegal; that, believing the representation of this officer, petitioner agreed to pay $4,000 for the license, stating to the officer that he would not receive the license, and pay that sum, or any other sum, if a license would be granted to Mandel authorizing him to retail liquor in said town in said year of 1897; that this agreement was transmitted to the corporation by the officer referred to, and the corporation issued a license to petitioner in accordance with such agreement; that the mayor of the town of Sparta entertained bad feelings towards her husband, and desired to injure petitioner, and, after petitioner had purchased the license, the mayor proposed to Mandel that he would issue to him a license to sell liquor in said town for the year 1897, if Mandel would convey to the corporation a tract and parcel of land lying near said town, and in addition thereto that the corporation would pay Mandel $500 in cash; that the land was not worth more than $2,200; that this proposition was accepted for the purpose of defrauding and damaging petitioner; and the said mayor issued to Mandel a license to retail spirituous liquors in the town of Sparta for the year 1897, giving him equal privileges with those granted to petitioner, and on the 9th of January, 1897, the said Mandel

conveyed the tract of land, as agreed on, to said corporation. The land in question is described in the petition as containing 575 acres, more or less. Petitioner avers that the land was not worth more than $2,200, and had been repeatedly offered for $2,500, but a purchaser could not be found at that price, so that the corporation issued to Mandel a license for about $2,500 less than that paid by petitioner; that the ostensible consideration agreed on in the purchase of the land was $4,500, and was made that the transaction might appear fair upon its face. Petitioner alleges that the tract of land constitutes a farm; that it is used for farming purposes; that it is beyond the corporate limits of the town of Sparta; and petitioner says that the corporation did not have the power to purchase the farm, and enter into the vocation of farming, which it has done. Petitioner alleges that the deed of conveyance is void because it forms a part of a fraudulent scheme to defraud petitioner. It is further averred that the corporation did not have the power to issue a license save for cash, and that Mandel did not pay the corporation anything, but received from it the sum of $500. It is further alleged that, if the corporation had not issued a license to Mandel, petitioner would have sold $30,000 worth of liquors in 1897, and realized a profit of $10,000, but, on account of the issuing of the license to Mandel, she was unable to sell $10,000 worth of liquors in said year, without any profit at all, whereby she was damaged $10,000. It is further alleged that the issuance of the license to Mandel was a discrimination against petitioner. The prayer is that the deed from Mandel to the corporation be declared void and canceled, and that petitioner have judgment for the sum of $12,500 damages against the corporation. By amendment it is alleged that the mayor and aldermen of Sparta exchanged a license with Mandel for the tract of land described, and paid Mandel $500 in addition. The prayer in the petition is amended by praying that she have a judgment in the sum of $2,500, which amount she alleges was fraudulently and illegally obtained from her by the mayor and aldermen of

Silver *v.* Mayor, etc., of Sparta

Sparta. The defendant demurred to the petition on a number of grounds. The court sustained the demurrer, and dismissed the petition, and the plaintiff in error excepted.

1. This is a very remarkable case, and, if the facts averred in the petition be true, a singular and entire misconception of the legal nature of a license to retail spirituous liquors, as well of the powers and duties of a municipal corporation, exists in the minds of both parties to the case. In any view of the case, the demurrer to the petition was properly sustained. The eighteenth section of an act of the general assembly entitled "An act to alter and amend, revise and consolidate the several acts granting authority to the town of Sparta, and to confer additional powers upon the mayor and aldermen of said town, and for other purposes," provides that said mayor and aldermen shall have exclusive right to grant, or, in their discretion, refuse to grant, licenses to sell malt, spirituous, or intoxicating liquors within the corporate limits of said town, shall prescribe the terms on which license may be issued, and regulate and control the same. Acts 1893, p. 316. A "license" is defined to be the granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not by a class to which the licensee belongs, and three leading ideas are involved in the definition of a "license" under the liquor laws: First, it confers a special privilege, or franchise, upon selected persons, to pursue a calling not open to all; second, it legalizes acts which, if done without its protection, would be offenses against the statute; third, it is a privilege, as a part of a system of police regulation, and therein is distinguishable from taxation. Black, Intox. Liq. § 117. In the case of Board *v.* Barrie, 34 N. Y. 659, it is said: "These licenses to sell liquors are not contracts between the state and the persons licensed, giving the latter vested rights, protected on general principles, and by the constitution of the United States, against subsequent legislation, nor are they property, in any legal or constitutional sense. They have neither the qualities of a contract nor of property, but are merely temporary

permits to do what otherwise would be an offense against a general law. They form a portion of the internal police system of the state, are issued in the exercise of its police powers, and are subject to the direction of the state government, which may modify, revoke, or continue them, as it may deem fit." Again, in the case of Brown *v.* State, 82 Ga. 224, 7 S. E. 915, it was said by SIMMONS, J., who delivered the opinion of the court, in referring to a license granted to retail liquors, that "such a license is in no sense a contract by the state, county, or city with the person taking out the license. It is simply a permit granted by the authorities to do business under the license, and the license may be revoked by the legislature at any time." In the case of Sprayberry *v.* City of Atlanta, 87 Ga. 123, 13 S. E. 197, it was said by the same judge, in delivering the opinion of the court, that the issuing of a license to retail liquors is not a contract, but is a permission to the licensee to engage in the business under such restrictions, conditions, and limitations as may appear judicious to the authority issuing the license. We may, therefore, take it as established that, when a license was issued to the petitioner by the mayor and aldermen of the town of Sparta, she was thereby invested with no right of property, but that she was only given a permit to engage in the business of retailing spirituous liquors, subject to the control of the municipal authorities of said town, and such authorities had the exclusive right to fix the license fee at such a sum as in their judgment the best interest of the people of the town required. Having, then, a permit to engage in the business, and having done so according to the terms of the license, the petitioner had no right to complain if the constituted authorities, in the exercise of the same discretion which caused the license to be issued to her, granted a similar permit to another person. But it is said that the license was issued to Mandel through the mayor of the town, in consequence of a desire on the part of the latter to injure the petitioner. It may be replied that under the statute the mayor has no power to issue licenses, but such power is conferred alone upon the mayor and aldermen as an

official body. The exercise of this power is a *quasi* judicial act, and, as it involves judgment and discretion, it must be exercised by the authority to which it is confided. It cannot lawfully be delegated to any other person or body. Black, Intox. Liq. §§ 155, 171. Being such, the official body with whom the power is lodged is not subject to respond in damages to one who feels himself aggrieved by their action. Ison *v.* City of Griffin, 98 Ga. 623, 25 S. E. 611. It is averred in the petition that the mayor and eldermen, while requiring from the petitioner cash in payment of the license fee, accepted from Mandel a tract of land of estimated value of $1,500, and paid to Mandel $500, the difference between the license fee and the value of the land. Assuming this to be true, and conceding, as we do, that such action was clearly illegal, beyond the powers of the corporation, and of which any citizen of the town would have a right to complain, such act does not give to the licensee any right to recover damages for such illegal action, nor does it give her any right, in an action such as is set out in the petition, to have the deed canceled; for, however much injury such action might have done to the citizens at large, it in no way affected the right of the petitioner to engage in the business for which she was licensed. It is true she alleges that, by this means and the issuance of the license under these circumstances, she had competition in her business. But, when she applied for and received a license to engage in the business of retailing spirituous liquors, she did so subject to the power of the municipal authorities of Sparta to grant other licenses for the same business,—a power which could not be alienated nor legally curtailed by any stipulation or agreement. In the case of Appling Co. *v.* McWilliams, 69 Ga. 840, the facts were that the law fixed the fee for license to retail spirituous liquors at $1,000, and that in payment for a license the ordinary received $500 in cash from an applicant, and took his note for the balance. The court below held that the note was illegal and uncollectible, but that judgment was reversed by this court, and, referring to this action of the ordinary in accepting the note, CHIEF

Notes

JUSTICE JACKSON, delivering the opinion of the court, said: "His conduct, however, is highly reprehensible. * * * Unquestionably the ordinary is bound to the county to pay the note, and, as these makers got by it what they bargained for, they ought not to escape, but * * * must all be held bound to pay it." Whatever may be the effect of the illegal action alleged in the petition, it is certain that the petitioner cannot derive any pecuniary benefit therefrom in the way of damages, nor recover from the municipal authorities any part of the sum paid by her as the license fee for the privilege of retailing spirituous liquors for the year 1897, under the facts stated in the petition. As fixing the amount of her damages, it is further alleged that, if the corporation had not issued the license to Mandel, she would have sold $30,000 of liquors during the year, and realized a profit of $10,000, whereas she realized no profit at all. If, up to this point, the plaintiff had made out a case entitling her to damages, the amount of which was to be measured by the profit she would have made, the petition would still be subject to demurrer. See Kenny *v.* Collier, 79 Ga. 743, 8 S. E. 58; Porter *v.* Johnson, 96 Ga. 145, 23 S. E. 123. From what has been said it must follow that the demurrer to the petition was properly sustained, and the judgment is affirmed. All the justices concurring.

NOTES.

Intoxicating Liquors—Licenses.—A license to sell liquor is not a contract. Powell *v.* State, 69 Ala. 10; Columbus City *v.* Cutcomp, 61 Iowa 672. And see cases cited in opinion in leading case.

Same—Licenses—Equal and Uniform Taxation.—A statute imposing a tax upon persons engaged in the liquor traffic, is not open to the objection that it is not "equal and uniform" and therefore unconstitutional because as a condition precedent to engaging in the occupation of selling intoxicating liquors it requires the tax to be paid in advance for the period of a year, but permits the tax on other occupations to be paid quarterly, and requires a license to pursue the business of selling liquors but permits other businesses to be pursued without a license. Nor is such statute unconstitutional because it permits counties to impose different rates of taxation at their discretion. Fahey *v.* State, 27 Tex. App. 146.

TOWN OF PROVIDENCE

v.

SHACKELFORD *et al.*

SAME *v.* PRICE *et al.* SAME *v.* FORSYTHE *et al.* SEBREE CITY *v.* KLYMAN. SAME *v.* HAMPTON *et al.*

(*Court of Appeals of Kentucky, April 14, 1899.*)

Payment of Licenses Imposed by De Facto City Governments—Recovery Back.*—After the defendant municipalities had been transferred by judgments of a circuit court from towns of the sixth class to towns of the fifth class, in each of them a city government organized pursuant to the statute governing cities of the fifth class fixed the license for selling certain liquors at $1,000, and plaintiff paid for such licenses. Subsequently, in an action against another town, the statute purporting to confer such authority upon circuit courts was declared unconstitutional; and towns of the sixth class could not fix such licenses at over $500. *Held*, that defendants could not recover $500 of the amount each of them had paid, on the ground that it was paid through mistake, and without authority of law.

APPEAL by defendants from Webster county circuit court. *Reversed.*

M. C. & G. D. Givens, *John W. Lockett*, and *F. M. Baker*, for appellants.

C. J. Waddill, *J. F. Gordon*, and *Bourland & Rayburn*, for appellees.

HOBSON, J. These five cases, involving the same facts, have by agreement been heard together. In the classification of the towns and cities of the state by the legislature the towns of Providence and Sebree City fell in the sixth class. After this they were, by the judgments of the circuit court of Webster county, pursuant to

Case Stated.

*See notes at end of case.

Town of Providence *v.* Shackelford

section 3661 of the Kentucky Statutes, transferred to the fifth class. Thereupon in each of these towns a city government, consisting of a mayor, city council, etc., was organized pursuant to the statute governing cities of the fifth class. These city authorities fixed the license for selling spirituous, vinous, and malt liquors at $1,000. Appellees took out a license, and paid the city $1,000 therefor. Subsequently this court in the case of Jernigan *v.* City of Madisonville, 43 S. W. 448, held the statute above referred to empowering the circuit court to transfer a town from one class to another to be in violation of section 156 of the constitution. Towns of the sixth class are not authorized by statute to fix the license for selling spirituous, vinous, and malt liquors at over $500, Ky. St. § 3704. Appellees thereupon filed these suits to recover $500 of the amount each of them had paid, on the ground that it was paid through mistake, and without authority of law. The contention of the appellees is that, as the attempted transfer of the towns from the sixth to the fifth class was void, because in violation of the constitution, the towns remained in fact in the sixth class, and so had power only to charge $500 for the license; and, $1,000 having been paid on the assumption that the towns had been legally placed in the fifth class, and so had the power of fifth-class cities, the excess over $500 should be paid back to them. They invoked the rule adopted in this state that money paid in ignorance of law may be recovered where, in equity and good conscience, it ought not to be retained. We do not think this principle applies here. The appellees have got all they bargained for. They wanted the privilege of selling spirituous, vinous and malt liquors at a certain place. This they paid for, and this they have enjoyed. It is immaterial to them whether the transfer of the towns from the sixth to the fifth class was legal or otherwise. There was, in fact, a city government of the fifth class under which they conducted their business and enjoyed all the rights they expected in taking out their license. The action of this *de facto* city government of the fifth class protected third parties dealing with

it. Appellees could not be indicted for selling without license, and they cannot assail the regularity of the city government which they themselves, by their conduct, acquiesced in. In Dill. Mun. Corp. § 43a, the learned author says: "Where a municipal corporation is acting under color of law, and its existence is not questioned by the state, it cannot be collaterally drawn in question by private parties; and the rule is not different although the constitution may prescribe the manner of incorporation. * * * Hence, in an action by such a corporation to recover penalties imposed by its ordinances, *nul tiel* corporations is not a good plea." In Railroad Co. *v.* Wilson, 33 Kan. 223, 6 Pac. 281, in disposing of a case something like this, the court, refusing to allow the regularity of the organization of a municipal corporation to be assailed, said: "The legality of the organization cannot be questioned in a collateral proceeding, nor at the suit of a private party. The organization cannot be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding prosecuted at the instance of the state by the proper public officer." In Clement *v.* Everest, 29 Mich. 19, in disposing of a similar objection, the court said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed except by some direct process authorized by the law, and then only for very grave reasons." In Kuhn *v.* City of Port Townsend, 41 Pac. 925, the supreme court of Washington said: "A private citizen cannot question the right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city. This can be done only in a direct proceeding prosecuted by the proper public officers of the state." To same effect, see Cooley, Const. Lim. (6th Ed.) 309, 310, and Thomp. Corp. § 503. These principles have been recognized by this court, and it is well settled that one who deals with a corporation, and recognizes its existence, is not permitted

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to raise the question whether it has been legally organized or not. Railroad Co. *v.* Leavell, 16 B. Mon. 363; Hughes *v.* Bank, 5 Litt. 46; Wight *v.* Railroad Co., 16 B. Mon. 7; Gill's Adm'x *v.* Mining Co., 7 Bush, 739. Appellees, as citizens of the towns, not only acquiesced in their organization as fifth-class cities, but, by taking out licenses from them, and acting under these licenses, they recognized the existence of the city government, and cannot now raise the question whether they had been legally organized or not. The last legislature passed an act transferring these cities to the fifth class (see Acts 1898, p. 81), and so all question of irregularity has now been removed. The government of a sixth-class town is totally different from that of a fifth-class city. It is conducted by different officers. One has a mayor and city council; the other has only a board of five trustees. The cities in question had no government as towns of the sixth class when these licenses were taken out, and, if the *de facto* government as a city of the fifth class was void, there was no government at all. Appellees did not receive a license from a sixth-class town. They received a license from a *de facto* fifth-class city, and the regularity of this fifth-class city government not having been questioned by the state cannot be questioned by them. The judgments below are therefore reversed, with directions to the court below to grant the appellants a new trial in each of these cases, and for further proceedings in conformity to this opinion.

NOTES.

Recovery Back of Taxes, etc.,—Voluntary Payment.—It has been held that an invalid tax voluntarily paid, though its invalidity was unknown at the time the payment was made, cannot be recovered unless its invalidity arose from facts known to the payer. Goddard *v.* Seymour, 30 Conn. 394; Kraft *v.* Keokuk, 14 Iowa, 86; Espy *v.* Fort Madison, 14 Iowa, 226; Kan. Pac. R. Co. *v.* Wyandotte Co., 16 Kan. 587.

A number of cases hold that the payment of a tax illegally levied is a voluntary payment, and cannot be recovered. Younger *v.*

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Board of Supervisors (Cal.), 9 Pac. Rep. 103; Welton *v.* Merrick Co. (Neb.), 20 N. W. Rep. 111; Balfour *v.* City of Portland, 28 Fed. Rep. 738; Sonoma Tax Case, 13 Fed. Rep. 789; and *note* Dunnell Mf'g Co. *v.* Newell, (R. I.), 2 Atl. Rep. 766. The contrary was held in Newson *v.* Board of Commissioners (Ind.), 3 N. E. Rep. 163; Thomas *v.* City of Burlington (Iowa), 28 N. W. Rep. 480; Winzer *v.* City of Burlington (Iowa), 27 N. W. Rep. 241; Breucher *v.* Village of Port Chester, 101 N. Y. 240; Jex *v.* City of New York (N. Y.) 9 N. E. Rep. 38; Schultze *v.* City of New York, 8 N. E. Rep. 528.

Same—Involuntary Payment.—Where the tax is paid to an officer or person having formal authority to collect it, such payment is involuntary; and if the tax is illegal, the money paid may be recovered. Tuttle *v.* Everett, 51 Miss. 27, 24 Am. Rep. 622. And it has been said that, "Where an illegal tax is paid, under protest, to one who has authority to enforce its collection, it is an involuntary payment, and may be recovered back if tax is illegal. Hubbard *v.* Brainard, 35 Conn. 563; Bradford *v.* Chicago, 25 Ill. 411; Trumball *v.* Campbell, 8 Ill. 502; Lauman *v.* Des Moines, 29 Iowa, 310; Joyner *v.* School Dist., 57 Mass. (3 Cush.) 567; Sandwich Glass Co. *v.* Boston, 45 Mass. (4 Metc.) 181; First National Bank *v.* Watkins, 21 Mich. 483; Grim *v.* School Dist., 57 Pa. St. 434; Hendy *v.* Soule, Deady (U. S. D. C.), 400."

As to when money voluntarily paid may be recovered back, see Town of Ligonier *v.* Ackerman, 15 Am. Rep. 323, 46 Ind. 552; also *note* to Black *v.* Ward, 15 Am. Rep. 171; Chandler *v.* Sanger, 19 Am. Rep. 367; Spaids *v.* Barrett, 11 Am. Rep. 10.

Same—Payment under Duress.—It is said by the court of appeals of Kentucky, in the case of Torbell *v.* City of Louisville, 4 So. Rep. 345, that one of the parties to an illegal tax, under the belief that it is valid, and in response to a demand and threat of compulsory payment, may recover it back upon discovering his mistake. But it is held by the supreme court of California, in Maxwell *v.* San Louis Obispo Co., 71 Cal. 466, that, when it appears there was no liability to anything beyond civil and criminal prosecution in case of refusal to pay certain license tax, and that in such prosecutions the invalidity of the law which authorized the collection of the taxes would have been a perfect defence,—a party making payment is not under such duress or compulsion, that he can recover back money so paid, in an action brought for that purpose. It is well settled that the mere apprehension of legal proceedings is not sufficient to make payment compulsory. There must exist immediate authority to enforce payment or to institute proceedings. Town of Ligonier *v.* Ackerman, 46 Md. 552.

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It seems to be well settled that a payment of taxes is not compulsory merely because it is made under a threat, express or implied, that the legal remedies will be resorted to, because mere threats are not coercion. De Fremery *v.* Austin, 53 Cal. 380; Williams *v.* Corcoran, 46 Cal. 556; Detroit *v.* Martin, 34 Mich. 173; Jackson *v.* Newman, 59 Miss. 385; Vicksburg *v.* Butler, 56 Miss. 72; Taylor *v.* Board of Health, 31 Pa. St. 73; Lea *v.* Memphis, 9 Baxt. (Tenn.) 103; Sonoma Co. *v.* Tax Case, 13 Fed. Rep. 92; Taylor *v.* Phila. Bd. of H., 31 Pa. St. 73.

Same—Payment under Protest.—It is said that, if taxes which are illegally assessed be paid under protest, may be recovered back (N. C. R. Co. *v.* Almanace, 77 N. C. 4; Welker *v.* Potter, 18 Ohio St. 85; Stephan *v.* Daniels, 27 Ohio St. 527; Marsh *v.* Supervisors, 42 Wis. 163; Hercey *v.* Supervisors, 37 Wis 75. See Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521; Kady *v.* Perrin, 14 S. C. 1), because payment under protest to an officer is not a voluntary payment. Ruggles *v.* Fond du Lac, 53 Wis. 436.

It is said by the supreme court of Maryland that, in Babcock *v.* Township of Beaver Creek, 31 N. W. Rep. 423, a non-resident partnership had property in another township, but their place of business was in the locality where they resided; the property was not assessed in their name but in the name of one of the partners, the collector demanded of them payment of the tax, and they paid the same under protest, the court held that the payment was involuntary and that they had the right to sue to recover it back.

A tax may be paid under protest and yet be voluntarily paid in which case the money paid cannot be recovered, because an illegal tax voluntarily paid under protest cannot be recovered back except in those cases where the person to whom it was paid had authority to enforce its immediate payment. See Bucknall *v.* Story, 46 Cal. 589, 13 Am. Rep. 220; Claycomb *v.* McCoy, 48 Ill. 110; Lima *v.* Jenks, 20 Ind. 301; Campbell *v.* New Orleans, 12 La. An. 34; Stickney *v.* Bangor, 30 Me. 404; Morris *v.* Mayor of Baltimore, 5 Gill (Md.), 244; Lee *v.* Templeton, 72 Mass. (6 Gray) 679; State *v.* Powell, 44 Mo. 436; Christy *v.* St. Louis, 20 Mo. 143; Sandford *v.* New York, 33 Barb. (N. Y.) 147; Phelps *v.* City of New York (N. Y.), 19 N. E. Rep. 408; Second Un. Soc. *v.* Providence, 6 R. I. 235.

In the case of Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512, where a tax was assessed on land under a statute which was afterwards decided to be unconstitutional, and prior to such decision the owner had paid the tax under protest to prevent a threatened sale, the court held that the payment was voluntary and that the money could not be recovered back. The reason for this would seem to be that a sale of land for taxes, laid under an unconstitutional law,

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does not constitute a cloud upon the title; and therefore payment of such taxes to prevent a sale is voluntary, though made under protest, and cannot be recovered. In Baker *v.* Big Rapids (Mich.), 31 N. W. Rep. 810, it was said that, where one pays his city taxes to the treasurer in December, stating at the time that he does so under protest, it appearing that the treasurer was by law authorized to receive in December such taxes as were voluntarily paid, but was not authorized to compel payment until the 1st of January, that the payment thus made must be considered as made voluntarily, notwithstanding the protest, and that the taxpayer cannot recover back the amount so paid upon the ground that the taxes were illegally assessed against him.

It is said by the supreme court of California, in the case of Younger *v.* Board of Supervisors, 68 Cal. 241, that where taxes based upon an illegal assessment are paid in order to prevent the property assessed from being returned delinquent, such payment is a voluntary payment, although made under protest, and no action lies to recover back the amount thereof.

The supreme court of Wisconsin say, in Rutledge *v.* Price County, 60 Wis. 35, that taxes and interest thereon paid under protest by a party in a state to foreclose tax certificates for illegal taxes, cannot be recovered when the complaint does not show in the plaintiff any title to the property which was subject to the taxation.

In the case of Sowles *v.* Soule, 59 Vt. 131, it is said that, where the defendant, a tax-collector (before the passage of act No. 11, Laws of 1882), attempted to restrain plaintiff's bank stock for the payment of taxes and advertised it for sale, and plaintiff before sale and with full knowledge of all the facts of the sale under protest, such payment was voluntary.

Same—Business Tax.—Where the right to recover, under the statute, illegal taxes paid under protest, such right to recovery applies to a business tax collected under a void ordinance. Caldwell *v.* City of Lincoln, 19 Neb. 569.

Same—Payment under Mistake.—An illegal tax voluntarily paid by mistake of both law and fact may be recovered. City of Louisville *v.* Anderson, 89 Ky. 334.

The supreme court of Indiana say, in the case of City of Indianapolis *v.* Patterson, 112 Ind. 344, that, "A married woman may recover city taxes paid by her on land not subject thereto because not legally annexed to the city, under a mistake of fact on her part in supposing that the land assessed had been included, in a plat of other land made by herself and husband, and properly annexed to the city. And she is not estopped by the fact that a street was improved, but not at the expense of the city, in front of some of her

lots, without her knowledge; she having before that time conveyed them to her children, and that the six years' statute of limitations, which applies to an action to recover taxes paid under mistake of fact, begins to run from each payment; and a married woman, whose disabilities were removed by the act of 1881, can only recover, in an action commenced more than two years after that date, for taxes so paid by her within the six years immediately preceding the institution of the action."

Same—Mistake of Legal Right.—Mere mistake of legal right is not sufficient ground for the recovery back of an illegal tax, license or fine. Elston *v.* Chicago, 40 Ill. 514; Robinson *v.* Charleston Council, 2 Rich. Law (S. Car.) 317; Savannah *v.* Feeley, 66 Ga. 31; Welch *v.* Marion, 48 Ala. 291; Bailey *v.* Paulina, 69 Iowa 463; Smith *v.* Hutchinson, 8 Rich. Law (S. Car.) 260; Churchman *v.* Indianapolis, 110 Ind. 259; Emery *v.* Lowell, 127 Mass. 138, 2 Dill. Mun. Corp. (4th Ed.) § 942 *et seq.*

It has been held that there could be no recovery back where the ordinances under which the tax was assessed were based on an unconstitutional statute. Baltimore *v.* Lefferman, 4 Gill (Md.) 425. See also Gordon *v.* Baltimore, 5 Gill (Md.) 231; Detroit *v.* Martin, 34 Mich. 170, 22 Am. Rep. 512.

HOKE *et al.*

v.

CITY OF ATLANTA.

(*Supreme Court of Georgia, April 25, 1899.*)

Illegal Assessments—Voluntary Payments—Protest—Recovery.*—A voluntary payment of an illegal assessment by a municipal corporation upon a property owner for a street improvement cannot, though made under protest, be recovered.

Same—Same—Duress.—When such an assessment is paid merely to prevent a levy upon realty, it cannot be said that the payment was made under duress, and was therefore involuntary, the more especially when a complete and easily available legal remedy to prevent the levy was open to the landowner.

(Syllabus by the Court.)

*See Town of Providence *v.* Shackelford *et al.* (Ky. 1899), *ante* and *notes.*

Hoke *v.* City of Atlanta

ERROR by plaintiffs from Fulton county superior court. *Affirmed.*

H. A. Alexander, for plaintiffs in error.
J. A. Anderson and *J. T. Pendleton*, for defendant in error.

LUMPKIN, P. J. The petition of W. A. and Sallie B. Hoke against the city of Atlanta made, in substance, the following case: They are the owners of a lot in the city, fronting on Butler street. On February 25, 1895, a municipal ordinance was adopted providing for the laying of a pavement of vitrified brick on the portion of that street on which petitioners' property abuts. This pavement was subsequently laid. Under the provisions of another ordinance adopted September 3, 1895, the abutting property owners, including petitioners, were assessed for specified portions of the cost of this paving. These ordinances (for reasons alleged) were void, and afforded no lawful basis for collecting from petitioners the amount assessed against them as their proportion of the expenses incurred in making the improvement. On October 30, 1895, other owners of real estate fronting on this portion of Butler street filed an equitable petition, attacking the above-mentioned ordinances, and praying that the city be enjoined from collecting from the plaintiffs therein any assessment on account of such paving. This action, after a decision thereon by the supreme court at the March term, 1896, thereof, finally resulted in the granting of a permanent injunction as prayed for. While this proceeding was pending, petitioners were notified of the assessment against them for their alleged proportion of the cost of the paving, and thereupon employed an attorney at law to represent them. He did not at once make them parties to the pending litigation; his delay in so doing being caused by an assurance given to him by a deputy city marshal "that the marshal had stopped all proceedings in connection with the contested assessment, and that the collection of the same would not be attempted from any one, whether their names

Case Stated.

Illegal Assessments—Voluntary Payments—Protest—Recovery.

were in the bill or not, until the question was finally settled." Acting on this assurance, petitioners' attorney waited until the 10th of January, 1896, before filing an intervention in their behalf, "believing that no further effort of collection would be made." In December, 1895, the officers of the city changed their plans, and proceeded to push for collection the paving bills against those who had not become parties to the then pending litigation. On the 10th of that month, without the knowledge of petitioners' attorney, an execution against their property was issued and delivered to the city marshal, who thereupon notified petitioners of this fact by letter, therein informing them that, unless the execution was paid within five days, their property would be advertised and sold. "Petitioners, upon receipt of this letter, conceiving that in the employment of an attorney and in appealing to the law they had availed themselves of all the protection thereby afforded, and believing that these steps had actually been taken by the said attorney, became exceedingly perplexed and alarmed at the threatened sale of their property; and believing that the law was unable to help them, and seeing no other means of relief, hastened to the city of Atlanta, from their home in North Carolina, and, on the 23d day of December, 1895, paid over to the city marshal the amount of the pretended claim, to wit, $163.65, accompanying the act with a protest, and taking from said officer a written receipt on which the fact of such protest was expressly entered. * * * Petitioners say that the issuance of an execution against their property as aforesaid, and without the least authority, was a mere trespass, working irreparable damage to, and casting a cloud upon, said property. * * * An illegality could not, moreover, have been employed until a levy had been made by the marshal, and said levy would have clouded the title to their property, and impaired their credit. Said remedy was therefore inadequate to the purpose. Petitioners say that they paid over said sum in the belief that they had appealed to law, and that the law had proven powerless to

stop the levy and sale, and that this belief was the result of the statements made by the officers of said city to the attorney of petitioners." They were actually made parties to the petition for injunction before the final judgment of the superior court was rendered. After the granting of the permanent injunction, they applied to the city for a return of the money they had paid to the city marshal, and payment of their demand was refused. The petition concluded with a prayer for the recovery of the sum paid by them to the marshal, with interest, and for attorney's fees incurred by them in bringing the present action. Upon demurrer, their petition was dismissed, and they excepted. The court committed no error in sustaining the defendant's demurrer. It plainly appears from the allegations of the petition that the payment to the city marshal was, in a legal sense at least, purely voluntary. That the money was paid under protest, and that this fact was recited in the receipt therefor, does not, in legal contemplation, render the payment involuntary. The plaintiffs had at hand an adequate remedy, and one of which they could easily have availed themselves for the purpose of avoiding payment and preventing a seizure and sale of their property. Notwithstanding the assurance given to their attorney at law by the deputy marshal that all proceedings in connection with this assessment had been stopped, the plaintiffs were themselves subsequently notified by the marshal that the collection of the assessment against them would be enforced by levy, unless they made payment within five days. It therefore plainly appears that there was no misplaced confidence on their part, or any artifice, deception, or fraud practiced upon them; but, on the contrary, they acted with full knowledge of, or had ample opportunities for ascertaining, all the facts. Nevertheless, upon coming to Atlanta, the plaintiffs did not even consult their attorney, but assumed, without investigation, that their legal remedies had been exhausted, and accordingly paid the assessment. If they had merely called upon their counsel, he would doubtless have promptly informed them of the condition of

the pending litigation with respect to these paving assessments, and it would have been the work of but a few minutes to make them parties thereto, and thus effectually prevent any levy upon or sale of their property; or, if for any reason they did not choose to pursue this course, they could have waited until a levy was actually made, and then met the same by an illegality, the execution being absolutely void.

The conclusions above announced are amply supported by authority. We extract the following from 18 Am. & Eng. Enc. Law, 220: "A voluntary payment of an illegal tax cannot be recovered back; and, if there is no mode of collecting the tax except by an ordinary proceeding at law or in equity, a payment will be considered voluntary, though made under protest." In a note upon the same page we find the following: "An assessment for a municipal improvement, if voluntarily paid, cannot be recovered back, though the payment was made under protest, and the law authorizing the assessment was subsequently adjudged unconstitutional,—[citing Peebles *v.* City of Pittsburg, 101 Pa. St. 304; Rogers *v.* Inhabitants of Greenbush, 58 Me. 390; City of Detroit *v.* Martin, 34 Mich. 170; Commissioners *v.* Walker, 8 Kan. 431; Bucknall *v.* Story, 46 Cal. 589; Town of Ligonier *v.* Ackerman, 46 Ind. 552]. If property is assessed for street improvements to a stranger, and the true owner, with knowledge of the facts, but under a misapprehension of, or in ignorance of, the law, pays the tax under protest and to prevent a threatened sale by the tax collector, such payment is voluntary, and cannot be recovered back,—[citing Bucknall *v.* Story, *supra*]."

In First Nat. Bank *v.* Mayor, etc., of Americus, 68 Ga. 119, this court held: "To recover taxes paid to a municipal corporation, it must appear that the tax was unauthorized; that the amount was actually received by the corporation; and that it was paid under compulsion to prevent the immediate seizure or sale of plaintiff's goods, or arrest of his

person. Voluntary payment, accompanied by protest, will not suffice." See opinion of SPEER, J., and the authorities therein cited. Among these, we refer especially to 2 Dill. Mun. Corp. §§ 940, 947, and the case of Railroad Co. *v.* Commissioners, 98 U. S. 541, in which MR. CHIEF JUSTICE WAITE quoted approvingly the following rule laid down in Commissioners *v.* Walker, 8 Kan. 431: "Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary." See, also, in this connection, Civ. Code, § 3723; Jackson *v.* City of Atlanta, 61 Ga. 228; Commissioners *v.* Norris, 62 Ga. 538; Mayor, etc., *v.* Feeley, 66 Ga. 31; McGehee *v.* Mayor, etc., 69 Ga. 581; Tatum *v.* Town of Trenton, 85 Ga. 468, 18 S. E. 705; Teem *v.* Town of Ellijay, 89 Ga. 154, 15 S. E. 33.

Same—Same—Duress.

It seems, therefore, to be clearly settled that a payment is not made under compulsion or duress, but will be treated as voluntary, unless the party making payment does so to prevent the immediate seizure of his goods, or the arrest of his person. It surely requires no argument to show that a threatened levy upon land is neither the one nor the other. Furthermore, the doctrine appears to be that, if the law affords to the person from whom the payment is exacted an immediate and adequate remedy to resist payment, he cannot be said to have acted under compulsion if, neglecting to avail himself of such remedy, he elects to make the payment demanded of him. Judgment affirmed. All the justices concurring.

CITY OF SHREVEPORT

v.

ROBINSON.

(*Supreme Court of Louisiana, June 12, 1899.*)

Power to Regulate Laundries.*—A municipality has no power to adopt an ordinance to prevent one from operating a laundry, on conditions different from others, who use machinery in carrying on their business.

(Syllabus by the Court.)

APPEAL by plaintiff from parish of Caddo judicial district court. *Affirmed.*

E. H. Randolph, City Atty., for appellant.
Wise & Herndon and *J. Henry Shepherd*, for appellee.

BREAUX, J. Plaintiff seeks to permanently enjoin the defendant from establishing and operating a laundry in a wooden building on his lot, not within the fire limits of the city of Shreveport. The ordinance reads: "An ordinance regulating laundries in the city of Shreveport, La. Be it ordained that it shall be unlawful for any laundry to be established or operated within limits bounded by Commerce street on the north, Travis street on the west, the V. S. & P. Ry. Co's tracks on the east, on the south by Wilson's alley, Texas avenue and Christian street, to where Christian and Travis streets intersect, unless the laundry is operated within a stone or brick building." The other section of the ordinance sets forth the penalty for violating the ordinance. The charter containing the delegation of power to the city of Shreveport under which the ordinance was adopted provides that the council shall see to the cleanliness and sanitary condition of the city, take measures for preventing and ex-

*See note at end of case.

tinguishing conflagrations, and determine in what part of the city wooden buildings shall not be erected, and prevent persons from reconstructing in wood old and decayed wooden buildings in these parts of the city where it is lawful to build in brick, stone, or metal. Act No. 158 of 1898. Plaintiff's counsel contends that the suit is not a suit to suppress a nuisance, but to determine whether or not the city council of Shreveport had the right to pass the ordinance. He affirms that it was passed in a legal way, and is a valid ordinance, so far as enactment goes, and that defendant is violating it, or is attempting to violate it; that the ordinance does not prohibit the laundry business in any part of the city, but simply regulates it. The defendant, on the other hand, contends that the city council had no right to pass the ordinance, and avers that the ordinance is not in the interest of public health or safety, is unreasonable, oppressive, and discriminates against a particular industry; and prays that the injunction be dissolved. There was a trial in the district court. The facts, as made evident by the record, are: That there are a number of wooden buildings in the district in which the defendant wishes to operate a laundry. There are blacksmith shops and other shops within its limits, in wooden buildings. Defendant, as a witness, swore that he proposes to inclose the boiler and machinery of his laundry in a brick building, and put a tin roof on it. The machinery is on the ground, and has not yet been placed in position for work. The injunction was dissolved, and from the judgment the plaintiff city appeals.

The defendant had bought the machinery for the laundry, and it was already on the ground at the date the ordinance was passed. We infer that the members of the city council, in adopting the ordinance, were looking to the future, and that it was not the intention to hinder the owners of buildings that were not within the fire limits from turning their buildings to some account, on condition that the use was not a nuisance, and not unsafe. We do not understand that defendant's proposed business is regarded as a nuisance. It

has been decided in several cases that it is not a nuisance *per se*. If the management be proper, and due regard be given to sanitary rules, it is not unhealthy, and it is not a nuisance. "A public laundry is not a nuisance *per se*, and cannot be made so by the legislative declaration of a city council." *In re* Hong Wah, 82 Fed. 623. The city disclaims that it is the intention to suppress this laundry, but she claims that the purpose was to put it in order; in other words, to regulate the concern. An ordinance which would not affect a blacksmith, a carpenter, or other mechanic using boilers and other machinery in some locality has the effect (in all probability never intended) of discriminating against an occupation and business, especially if it does not appear that the business in any manner endangers public health, under proper regulation, and does not give rise to greater risks from fires. Now, as relates to regulating the laundry, no attempt is made in that direction, save that it must be operated, if at all, in a brick or stone building. We do not think it is customary or lawful to select a particular occupation or business in a locality, and bring it within the range of a city ordinance establishing a "fire limit." It may be, for all we know, that the city of Shreveport had power to extend the fire limit (a question not before us). In that case all owners of property would be subjected to the same regulation regarding buildings of bricks and wood, and then all alike would be subject to the rule adopted. But we are firm in our conviction that the city council is without power to adopt an ordinance to prohibit those carrying on a particular business from using the buildings belonging to them prior to the adoption of the ordinance, if the occupation is not at all a nuisance, and not more dangerous than the machinery used by others in their business. In *Ex parte* Sing Lee, 31 Pac. 245, the supreme court of California said: "The business of conducting a laundry is a lawful occupation, precisely as much so as is that of the carpenter, blacksmith, or merchant; and is not of itself, and irrespective of the

manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right to follow this business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits, as is attempted in the ordinance under review." We think, for the same reason, that the business of conducting a laundry cannot be singled out, and the owner forced to conduct it in a brick building, the place not being within the "fire limits." An inoffensive business of the ordinary kind is not subject to special and particular regulation, such as a merchanic's shop, carpenter's bench, near which there may be a propelling force, and other similar works. Defendant's business is classed as inoffensive when properly managed and conducted. Ergo, it cannot be regulated by a municipal council to the extent of requiring that it shall carry on the business in a brick or stone building, although it is not within the "fire limits" of the city. "It is clear that the enforcing of the ordinance may obstruct defendant's business, while others from whom the ordinance is withheld may actually be benefited by what is thus due to their neighbor." Yick Wo *v.* Hopkins, 118 U. S. 373, 6 Sup. Ct. 1072. The following from the opinion of the court *a qua* meets with our approval: "My conclusion is that, considering that the laundry business is not *per se* a nuisance, nor even a *prima facie* nuisance, and further considering that the use of a steam plant as a motor power in said business does not even partake of the character of a nuisance, and further considering that the city has no power to compel the defendant to erect a house of brick or stone on his premises, outside of the 'fire limits,' as a condition precedent to his engaging in the laundry business, and further considering the right of the defendant to use his own property in a legitimate business enterprise as long as he does not injure the rights of others, the ordinance in question is not authorized by the city charter, and is therefore illegal, and void in

law." It is therefore ordered, adjudged, and decreed that the judgment appealed from is affirmed.

NOTE.

Ordinances—Discrimination.—Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws. Soon Hing *v.* Crowley, 113 U. S. 703, 7 Am. & Eng. Corp. Cas. 646.

In **Tugman** *v.* Chicago, 78 Ill. 405, it was held that the fact that certain persons were engaged in a particular kind of business in a given locality, at the time of the adoption of an ordinance, would not authorize the municipal corporation, by such ordinance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality. See, generally, Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Mayor, etc., of Hudson *v.* Thorne, 7 Paige (N. Y.), 261; Russ *v.* Mayor, etc., of New York, 12 N. Y. Leg. Obs. 38; White *v.* Mayor, 2 Swan (Tenn.), 364; De Ben *v.* Girard, 4 La. Ann. 30; State *v.* East Orange, 41 N. J. L. 127; Richmond, etc., R. R. *v.* Richmond, 96 U. S. 521; Municipality *v.* Blineau, 3 La. Ann. 688; Boyant *v.* Campbell, 9 Rob. (La.) 411; Covington *v.* East St. Louis, 78 Ill. 548; *In re* Frank, 52 Cal. 606; Baton Rouge *v.* Cremonini, 36 La. Ann. 247; *Ex parte* Chin Yan, 60 Cal. 78; Zanone *v.* Mound City, 103 Ill. 552; Citizens' Gas & Min. Co. *v.* Elwood, 114 Ind. 332; Shreveport *v.* Levy, 26 La. Ann. 671, 21 Am. Rep. 553.

City of New Orleans

v.

Lozes.

(*Supreme Court of Louisiana, April 3, 1899.*)

Meat Inspection—Validity of Ordinance—Constitutional Law.*—Ordinance No. 14,807, C. S., which provides a meat-inspection service, and a precedent observance thereof, as a condition of the right to either expose same for sale, or to sell the same, in the city of New

*See note at end of case.

City of New Orleans *v.* Lozes

Orleans, is legal, valid, and constitutional, and same evidences a proper and legal exercise of police power, for the protection and preservation of the public health and sanitation of the municipality.

Same—Same.—In this regard, the city has ample warrant of law to pass ordinances requiring *ante mortem* inspection of animals intended to be slaughtered for use as human food, as well as those requiring *post mortem* inspection of the meat of such animals before same is placed upon the market for sale.

(Syllabus by the Court.)

APPEAL by defendant from recorder's court of New Orleans. *Affirmed.*

Barnard B. Howard, *Henry O. Hollander*, and *Augustus M. Aucoin*, for appellant.

James J. McLoughlin, *Asst. City Atty.*, and *Samuel L. Gilmore*, *City Atty.*, for appellee.

WATKINS, J. An affidavit was made against the defendant to the effect that on the 4th day of December, 1898, at about the hour of 4 o'clock a. m., in the Ninth Street Market, in said city, he did violate Ordinance 14,807, §§ 1, 2, by selling, or offering for sale, meat, without same having been first inspected, marked, or tagged, whereupon he was charged with having been guilty of an offense for which he should be arrested and dealt with according to law. To this charge the defendant tendered the following demurrer, *viz.*: (1) That the pretended Ordinance No. 14,807, C. S., is illegal, *ultra vires*, null and void, and of no effect, for the reason that the city council of the city of New Orleans is and was without authority to pass same. (2) That said pretended ordinance is unconstitutional, because it seeks to impose a tax which has already been imposed by the state of Louisiana, and the same is illegal, null, and void, being in conflict with the provisions of Act No. 118 of 1869, Act No. 144 of 1877, Ex. Sess., and Act No. 87 of 1888. (3) That said ordinance is illegal, because by the enactment of said laws, with regard to the inspection of meats intended for consumption as human food within the parish of Orleans, the entire subject-matter "has been entirely

Case Stated.

and completely placed under the power and jurisdiction of the state board of health of the state of Louisiana." (4) That said ordinance is illegal, because it seeks to set aside and render of no effect the provisions of Act No. 87 of 1888, under and in pursuance of which his meat had been already inspected, and a proper certificate issued to him, and for which he had already paid the necessary and legal fees therefor; and hence this is an attempt on the part of the city of New Orleans, through its board of health, "to exact a dual fee for one and the same service," in violation of the constitution and law. This demurrer was overruled, and the defendant was tried, upon the introduction of evidence was convicted, and sentenced to pay a fine of $15, and, in default of payment of same, to suffer imprisonment in the parish prison for a period of 15 days, and from that sentence he prosecutes this appeal.

The case comes to us on the ground that the recorder erred in overruling the defendant's demurrer. As explanatory of the situation, we make the following extract from the brief of defendant's counsel: "The defendant was a butcher, doing business in the city of New Orleans, and having his cattle slaughtered in the parish of St. Bernard, under the supervision and regulations of the state board of health, paying for the inspection, and receiving a certificate therefor, to the effect that the cattle inspected were healthy, and fit for human food, and had been slaughtered at the Crescent City Slaughter House. The cattle are slaughtered, and the city seeks to collect from him, under Ordinance 14,807, C. S., another fee for the same service, through the inspector of the municipal board of health of the city of New Orleans. Said board inspected the meat, but refused to tag the same, because the defendant declined to pay the second fee for said inspection, and he was arrested under the charge of selling meat which had not been inspected, and thereupon he entered the demurrer on the grounds stated."

The first contention of defendant's counsel is that said pretended Ordinance 14,807, C. S., is illegal, null, and void,

because the city was without power to pass the same, it being in conflict with Act No. 192 of 1898, and Act No. 87 of 1888, and Act No. 118 of 1869; said legislative enactments having vested the exclusive power and authority in the state boards of health specially provided for therein, and repealed all laws, or parts of laws, in conflict or inconsistent therewith. The second contention is that said ordinance is unconstitutional because it seeks to impose a tax that has already been imposed by the state of Louisiana for the same service, and for that reason it is in direct conflict with the provisions of the legislative acts referred to. Or, in other words, that those respective acts especially impose an inspection fee for meat slaughtered at the Crescent City Slaughter House, to be brought into the city of New Orleans for human consumption, and that hence the city of New Orleans is without power to impose another tax for exactly the same service. Defendant's further contention is that, by laws enacted for the regulation and inspection of meats intended for sale in the parish of Orleans for human consumption, the entire matter is exclusively in the hands of the state authorities, and that the city of New Orleans has nothing to do therewith.

Counsel for the defendant makes the following statement of the facts on which these contentions are founded: That the defendant in this case had his meats inspected under Act No. 87 of 1888 and Act No. 192 of 1898 by the officers of the state board of health; that the city board of health is only auxiliary to, and a branch of, the state board, and is specifically prohibited from acting independently of the state board, but, on the contrary, is compelled to act under the supervision and advice of the state board of health, and to do no act in conflict with the powers and duty of the state board. This ordinance, therefore, provides that the second fee herein sought to be collected shall be paid practically to the same health authorities, which is in violation of the said constitution. Counsel further contend that the only inspection that was offered to the accused was within the limits of the parish of St. Bernard, and therefore outside of the parish

of Orleans, and consequently not within the limits prescribed by the ordinance,—that is, the city of New Orleans; that no inspection is offered or attempted in the city of New Orleans under said ordinance. Restating and combining the foregoing objections, counsel for the defendant submits that the ordinance in question is illegal, unreasonable, unnecessary, and serves no good purpose whatsoever; but, on the contrary, it places an unnecessary burden and tax upon the people and upon the accused, in violation of the tenor and spirit of said laws.

The contention of the city attorney is that Ordinance 14,807, C. S., imposes a penalty upon any person offering untagged and uninspected meat for sale, and that the defendant, as a butcher, is charged with having offered for sale, in a public market of the city of New Orleans, meat intended for human food, which had not been inspected by the inspectors of the city board of health, the meat having no tag or stamp showing that such inspection had been made; that consequently the question presented is of the power of the city to pass said ordinance, because the power of inspecting meats was exclusively vested in the state board. The city attorney further says: "There is no question of the power of the city to pass any ordinance to protect the health of its citizens, nor can it be disputed that an ordinance providing for the inspection of meat which is to be consumed in New Orleans is a health ordinance. Now, unless the state has devested the city of the right to protect its inhabitants from bad meat, then the power to protect resides in the council. But we need not go that far. The very act which the defendant cites (Act No. 192 of 1898) not only devests the state board of health of any supervision whatever over meat which is to be consumed by the people of New Orleans, but expressly confers it upon the city board of health exclusively. The constitution of 1898 (article 296) reads: "The general assembly shall create for the state, and for each parish and municipality therein, boards of health, and shall define their duties and prescribe the powers thereof.' Act No. 192 of

1898 is entitled 'An act to carry into effect article 296 of the constitution of 1898,' and section 9 of the act says: 'The municipal board of health of the city of New Orleans shall have the exclusive right to the collection of all fees and charges, now being made by the present state board of health within the city of New Orleans, other than those accruing from coal oil inspection and the registration of physicians, midwives and dentists. The municipal board of health of the city of New Orleans shall have the exclusive supervision or authority over meat inspection service and sanitary regulations at the slaughtering pens, or abattoir, in the parish at St. Bernard, with regard to all meat intended for human consumption within the city of New Orleans.' The same section (section 9) repeals all laws, or parts of laws, inconsistent with, or in conflict with, this act of 1898; from which it is plain that the entire and exclusive control of the inspection of meats in the parish of St. Bernard, at the slaughter pens, is conferred upon the city board of health, in so far as meat intended for human consumption in New Orleans is concerned. Such being the case, any other inspection is irregular, *ultra vires*, null, and void. It is admitted in this case that the meat offered for sale by the defendant was intended for consumption in the city of New Orleans, and came from animals slaughtered at the slaughtering pens in the parish of St. Bernard. Such being the facts, it is incompetent for any other inspector than the inspector of the city board of health to issue any certificate of inspection of meats slaughtered in St. Bernard for New Orleans consumption; and the attempt of the defendant to introduce in evidence a certificate of the inspection of certain live cattle issued by a person not the inspector of that board was properly objected to by counsel for the city, and the ruling of the court admitting such evidence was incorrect. * * * That said certificate related solely to live cattle, whereas the city board's inspection is of dressed meat only." His contention is, further, that defendant's case rests upon the provisions of the act of legislature above referred to,

which refer exclusively to cattle on the hoof, and not at all to dead meat; and, if they did refer to dead meat, they would be superseded and repealed by the provisions of Act No. 192 of 1898, above referred to.

Summing up all these various contentions, and the question comes to this, whether the city, in the exercise of its police power, or under the terms of the constitution and law of 1898, has the power to regulate the inspection of meat at the slaughter house, or in the city of New Orleans, which is intended for use as human food, or whether the same are inoperative by reason of the fact that said former laws confer upon the state board of health the power of inspecting live cattle intended to be slaughtered for use as human food. The general rule governing the construction of statutes, as well as precepts of the constitution, is that apparently conflicting provisions of either or both shall rather receive that construction which will render them harmonious than one which will render any portion inoperative and void. The several acts referred to and relied upon by counsel for the defendant relate, exclusively, to the slaughtering of live cattle,—that is, those on foot or on the hoof,—which slaughtering is and was, in contemplation thereof, to be done outside of, and beyond the territorial limits of, the city of New Orleans. Ordinance No. 14,807, C. S., provides, among other things, that "it shall not be lawful for any person, firm or corporation, restaurant or hotel, to sell or offer for sale, or deliver the meat of any animal, not considered game or fowl, intended for human food, within the city of New Orleans, without same has been first inspected and passed upon and approved by the officers appointed and empowered for such duty by the municipal board of health of the city of New Orleans," etc. It further provides "that such meat, when so inspected, passed upon and approved, shall be properly marked and tagged by said inspectors, and same shall not be allowed upon the stalls of any market, whether public or private, or exposed in any other way, or at any other place,

Meat Inspection —Validity of Ordinance—Constitutional Law.

or delivered to any hotel, restaurant, person or persons, unless so tagged and marked, after having been inspected by the inspectors of said board of health." It further provides "that for the purpose of meeting the costs of said inspection, the owner of the meat inspected, or the person in possession of the meat inspected, shall pay the following inspection fees to the board of health,"—enumerating them in detail. This ordinance, in terms, includes the case presented by the defendant, and brings him within the penalty therein provided for a violation thereof. It appears quite evident that the ordinance deals exclusively with the inspection of meat or flesh of animals already slaughtered, and which is intended for use as human food within the city of New Orleans; and that it is an essentially different subject-matter from that with which the general assembly dealt in the statutes quoted,—the inspection of live cattle, although intended for human food. For, notwithstanding the live cattle, upon proper and careful inspection, are found healthy and suitable for the purpose of being slaughtered for human food, *non constat* that, when slaughtered and prepared for market, the meat is suitable for human food, when subsequently put upon the market for sale. Were no restraint put upon a subsequent sale of fresh meats, by means of contemporaneous inspection by the proper officers of the city board of health, great abuse of the privilege might result, and great and incalculable injury be inflicted upon the community thereby, notwithstanding a rigid and careful inspection had been made prior to the slaughter of the animals. But, if this were not so, we are of opinion that the ordinance is fully authorized by the law of 1898, and that the statute is constitutional. Act No. 192 of 1898 was passed for the express purpose of putting into operation article 296 of the constitution of 1898, which requires the general assembly to "create for the state, and for each parish and municipality therein, boards of health, and to define their duties and prescribe the powers thereof." Its further object is to provide for the protection and preservation of the public health, and for "a general

sanitation of the state, and a local sanitation of parishes and municipalities," etc. That act provides "that the council or legislative body of each and every incorporated municipal government in the state shall establish and organize a town or city board of health," indicating the particular method of the establishment and organization thereof. It specially authorizes and requires said municipal boards "to appoint a sanitary officer, whose duty it shall be to enforce the requirements of said board in all matters of sanitation," etc. *Id.* § 5. It further specially provides "that said parish and municipal boards shall have power and authority to pass health and sanitary ordinances for defining and abating nuisances, dangerous to public health; * * * to regulate the carrying on of trade and business injurious to public health; * * * and generally [to pass] all health and sanitary ordinances necessary and incident to the proper local sanitation of the parish, city or town in which they exercise their powers." It further provides, *ex industria*, that it is the object and purpose of this act "to intrust full power and authority to such local boards to establish, control and administer all matters of strictly and purely local sanitation, not affecting other portions of the state." *Id.* § 7. A comparison of the foregoing provisions of the statute with those of Ordinance No. 14,807, C. S., will show them to be perfectly harmonious and consistent. It is of no material consequence that a municipal board of health now existing, or which may be hereafter created, would possess a similar power to pass ordinances upon the same or like subjects; as the city is primarily charged with the duty of protecting and preserving the public health, and of maintaining the municipality in a proper sanitary condition. In furtherance of that idea, we are referred to the provisions of several ordinances prior in date to that of No. 14,807, C. S., which was adopted on November 10, 1898. The first is Ordinance No. 13,487, C. S., bearing date July 6, 1897, which provides that "it shall be unlawful for any person, firm, or corporation to sell, or offer for sale, or deliver the meat of any animal not considered

game, intended for human food, within the city of New Orleans, without same having been first inspected and passed upon and approved by the officers appointed and empowered for such duty by the board of health." It provides further "that such meat when so inspected, passed upon, and approved, shall be marked or tagged by said inspectors, and same shall not be allowed upon stalls of any market, whether public or private, unless so tagged or marked after having been inspected by said inspectors of the board of health." It further provides for the punishment of persons who violate its provisions. That ordinance was afterwards supplemented by the passage of Ordinance No. 13,689, bearing date October 5, 1897, which dealt with the counterfeiting of any tag or stamp provided for in the original ordinance, and affixing a penalty for such an act. The particular significance of the foregoing ordinances is that they precede in date both the constitution and statute of 1898, and appear never to have been assailed or questioned, as either illegal or unconstitutional, on the grounds now stated for the first time, notwithstanding they are precisely similar in terms to those of Ordinance No. 14,807. But there is an additional ordinance, No. 14,548, bearing date August 31, 1898, and which appears to have been adopted intermediately between the passage of the act of 1898 and Ordinance No. 14,807, which specially deals with "the slaughtering of cattle and other animals at the abattoirs, and providing a system of inspection of meats." That ordinance provides, among other things, "that all meats brought into the parish of Orleans requiring inspection under Ordinance 13,487, C. S., must bear evidence of having undergone previous inspections, *i. e.* must bear the stamp or certificate of some specially accredited state, municipal, or United States official, attesting the fact that the animal has passed both an *ante* and *post mortem* inspection." Section 10, Ordinance No. 14,548. This ordinance puts the proposition of the city council in a very plain light, by requiring that all meats brought into the city, which are intended for use as

Same—Same.

Note

human food, shall bear evidence of having undergone previous inspection; that is to say, that same have passed "both *ante* and *post mortem* inspection." This ordinance conforms the inspection of meats to the idea hereinbefore outlined, and it seems to us to be a most reasonable regulation, and one tending to the protection of the public health. It shows clearly that, in the appreciation of the city council, a single inspection of cattle on the hoof, before being slaughtered, was insufficient and inadequate, and in that opinion we concur. We find nothing in either the constitution or statute of 1898 contrary thereto. In our opinion, Ordinance No. 14,807, C. S., is legal, valid, aud constitutional. Judgment affirmed.

MONROE, J., takes no part, as he was not a member of the court when the case was submitted.

NOTE.

Meat Inspection Laws—Constitutionality—Interstate Commerce.—In Swift *v.* Sutphin (C. C.), 27 Am. & Eng. Corp. Cas. 659, it was held that a statute which prohibits the sale of any meat taken from an animal which has not been inspected before being killed by inspectors appointed pursuant to the provisions of the act, is unconstitutional as an interference with the power of congress to regulate interstate commerce, the effect of the act being to prohibit the importation of dressed meat from other states.

And in State of Minnesota *v.* Barber, 136 U. S. 313, 32 Am. & Eng. Corp. Cas. 405, it was held that the Minnesota Act of April 16, 1889, "for the protection of the public health by providing for inspection before slaughtering of cattle, sheep, and swine designed for slaughter for human food" and requiring as a condition of sales in Minnesota of fresh meat from these animals, that the animals shall have been inspected in the state before being slaughtered, makes such discrimination against the products of other states, in favor of Minnesota, as interferes with, and burdens commerce among the states, and is therefore unconstitutional and void.

The court further held that such a statute cannot be considered as the rightful exercise of the police power of the state, if the

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inspection prescribed prevent the introduction into the state of sound meats, the product of animals slaughtered in other states.

A statute of Virginia, entitled "An act to prevent the selling of unwholesome meat," approved February 18, 1890, (Laws of Virginia, 1888–1890, p. 63, chap. 80) declares it to be unlawful to offer for sale, within the limits of that state, any beef, veal, or mutton from animals slaughtered one hundred miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors appointed under that act. It provides that the inspector shall receive as his compensation one cent per pound to be paid by the owner of the meats. The act does not require the inspection of fresh meats from animals slaughtered within one hundred miles from the place in Virginia at which such meats are offered for sale. *Held*, that the act is void, as being in restraint of commerce among the states, and as imposing a discriminating tax upon the products and industries of some states in favor of the products and industries of Virginia. The owner of meats from animals slaughtered one hundred miles or over from Virginia has the right to compete in the markets of that state upon terms of equality with the owners of meats from animals, slaughtered in that state or elsewhere, within one hundred miles from the place at which they are offered for sale. In Brimmer *v.* Rebman, 138 U. S. 78, HARLAN, J., said: "Undoubtedly, a state may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the states in favor of the products and industries of its own or of other states. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within 100 miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a state, is, when applied to the people and products or industries of other states, a direct burden upon commerce among the states, and therefore void. Welton *v.* Missouri, 91 U. S. 275, 281; Hannibal & St. J. R. Co. *v.* Husen, 95 U. S. 465; Minnesota *v.* Barber, 136 U. S. 313. The fees exacted under the Virginia statute for the inspection of beef, veal, and mutton, the product of animals slaughtered 100 miles or more from the place of sale, are, in reality, a tax; and 'a discriminating tax imposed by

Note

a state, operating to the disadvantage of the products of other states when introduced into the first-mentioned state, is, in effect, a regulation in restraint of commerce among the states, and, as such, is a usurpation of the powers conferred by the constitution upon the congress of the United States.' Walling *v.* Michigan, 116 U. S. 446, 455, 11 Am. & Eng. Corp. Cas. 383. Nor can this statute be brought into harmony with the constitution by the circumstance that it purports to apply alike to the citizens of all the states, including Virginia; for, 'a burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute.' Minnesota *v.* Barber, above cited; Robbins *v.* Shelby Taxing Dist., 120 U. S. 489, 497, 16 Am. & Eng. Corp. Cas. 1. If the object of Virginia had been to obstruct the bringing into that state, for use as human food, of all beef, veal, and mutton, however wholesome, from animals slaughtered in distant states, that object will be accomplished if the statute before us be enforced.

It is suggested that this statute can be sustained by presuming—as, it is said, we should when considering the validity of a legislative enactment—that beef, veal, or mutton will or may become unwholesome, 'if transported one hundred miles or more from the place at which it was slaughtered,' before being offered for sale. If that presumption could be indulged consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case, because the statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the states. It is, for all practical ends, a statute to prevent the citizens of distant states, having for sale fresh meats (beef, veal, or mutton,) from coming into competition, upon terms of equality, with local dealers in Virginia. As such, its repugnancy to the constitution is manifest. The case, in principle, is not distinguishable from Minnesota *v.* Barber, where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb, and pork, offered for sale in that state, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that state, practically, all such meats—in whatever form, and although entirely sound and fit for human food—from animals slaughtered in other states."

In *Ex parte* Keiffer, 40 Fed. Rep. 399, BREWER, J., held that an

ordinance of the city of Topeka which provided that animals must be inspected before slaughtered and must be slaughtered within one mile of the city limits, was unconstitutional as interfering with interstate commerce, the effect of the ordinance being to exclude dressed meat brought from a distance. The judge in this case deemed the question to be so well settled that he declined to enter into any extended discussion of the subject.

See also *In re* Christian (Minn.), 27 Am. & Eng. Corp. Cas. 669.

MOORE

v.

MAYOR, ETC., OF TOWN OF JONESBORO.

(*Supreme Court of Georgia, May 29, 1899.*)

Ordinances — Judicial Notice.* — Unless expressly directed by statute, neither this court nor the superior court can take judicial cognizance of a municipal ordinance; hence an exception to a judgment rendered by a municipal court, which alleges in general terms that the judgment is contrary to law (the point intended to be made being that the judgment was contrary to an alleged ordinance), cannot be considered, when the ordinance in question does not appear in the record.

Failure to Work Streets—Penalties—Tender of Street Tax.—After failure to perform a public duty, to which failure a penalty is attached, it is not competent for a defaulter to acquit himself of the default by tendering a sum of money, the payment of which is fixed by law as the alternative of such performance. He must, in the first instance, perform the work required, or make payment of such sum. The penalty attaches on his failure to do the one or the other when lawfully required. (a) The evidence in the municipal court warranted the conviction of the accused of the offense charged, *viz.* a default in working the streets.

(Syllabus by the Court.)

ERROR by defendant from Clayton county superior court. *Affirmed.*

J. B. Hutcheson, for plaintiff in error.

W. L. Watterson, for defendant in error.

*See State *v.* Cruickshank, 1 Mun. Corp. Cas. 399, and *note* 399.

Moore *v.* Mayor, etc., of Town of Jonesboro

LITTLE, J. By his petition for *certiorari*, the plaintiff in error makes it appear that he was tried in the mayor's court for the town of Jonesboro for failure to pay his street tax to said town, and was fined in the sum of four dollars, to be discharged by eight days' work on the public streets of that town. After his conviction, he appealed to the council of the town, and the judgment of the mayor was sustained. He presented a petition for *certiorari* to the judge of the superior court. On the hearing the *certiorari* was dismissed, and to that ruling he excepted. From the answer of the mayor and council made to the writ of *certiorari*, it appears that on July 9th the plaintiff in error was summoned to work on the streets of the town; that he appeared in answer to the summons, and worked a half day, and did not reappear for the prosecution of the work; that a case was made against him, as he was in default for 1½ days' work, or the payment of the sum of 75 cents in lieu of such work. On the next day the plaintiff in error came and tendered the sum of 75 cents, which was refused, on the ground that a case had already been made against him as a defaulter. On the trial before the mayor, the plaintiff in error alleged that he was sick, and not able to work, and that, on the morning afterwards, he carried the money to an officer of the town, who refused to accept the same.

Case Stated.

1. It was submitted on the argument here that the ordinance of the town of Jonesboro under which the defendant was convicted and sentenced did not authorize the judgment rendered by the mayor, and the petition for *certiorari* alleges that such judgment is contrary to law. The record does not contain any copy of the ordinance in question. Attached to the brief of the plaintiff in error is a certified copy of what purports to be an ordinance of the town of Jonesboro. In the consideration of cases presented, this court can only look to the record for the facts, and we are not at liberty to accept or consider as evidence anything which does not appear in the record. It being admitted in the argument that there was an ordi-

Ordinances—Judicial Notice.

nance of the town of Jonesboro requiring persons resident therein to work on the streets of the town, and the defendant by his bill of exceptions complaining that the judgment against him by the municipal authorities was in violation of the ordinance, it is incumbent upon him to show such violation. The courts of this state cannot, unless authorized by statute, take judicial cognizance of the ordinances of a municipal corporation. It is required by express statute, in the case of one or more of the cities of this state, that such judicial cognizance shall be taken, but, as a general rule, a municipal ordinance must be proven, when it is desired that its terms be considered. Inasmuch, therefore, as the ordinance of the town of Jonesboro which it is complained was violated does not appear in the record, we are unable to consider the question whether the sentence imposed was in violation of law.

2. The evidence set out in the answer of the mayor and council is sufficient to sustain the conviction of the plaintiff in error. In his statement he admitted that he was summoned to work the streets, to commence on Monday, July 11th; that he appeared in response to the summons; that he was unwell, and not able to work; that at noon he was requested by a gentleman to work for him; that that gentleman gave him the money to pay his street tax; and that next morning he tendered it. According to this statement and the evidence which was submitted, the plaintiff in error had the alternative either to work the streets, or, in lieu thereof, to pay a given sum of money. When summoned, he elected to do the work, and appeared, but worked only for a short time. Not appearing again, the case was made against him, and properly so, we think. When summoned, or at least when the time came for him to commence work, it was his duty to make his election. He chose to work, and when he subsequently stopped working, before the expiration of the time he was required to work, he was a defaulter, and then became liable for the penalty imposed on a defaulter. Hav-

Failure to Work Streets—Penalties—Tender of Street Tax.

ing thus been in default, and having incurred the penalty, it was too late for him to avail himself of the alternative of the ordinance which he had already violated. The authorities could have accepted such alternative payment had they been inclined to do so, but they had also the power to treat him as a defaulter, and to inflict on him, as such, the penalty prescribed by the ordinance of the town. In this instance they chose to do the latter; and, it not appearing that the sentence imposed is in violation of law, the judge did not err in dismissing the *certiorari*. Judgment affirmed. All the justices concurring.

COLLINS

v.

RUSSELL.

(*Supreme Court of Georgia, April 24, 1899.*)

Shortening Incumbents' Terms of Office—Constitutionality of Statute.*—The legislature of this state has the constitutional power to pass an act shortening the terms of the offices of clerk and sheriff of the city court of Savannah, and the term of service of an incumbent of one of these offices may be thus brought to an end before the expiration of the time for which such incumbent was originally elected.

Same—Same—Same.—The act of the legislature approved December 16, 1898 (Acts 1898, p. 265), entitled "An act to fix the time for the election of all city officers now elected by the council of the mayor and aldermen of the city of Savannah, to provide for the terms of such officers, to terminate the terms of those now in office, and for other purposes," does not violate paragraph 17, § 7, art. 3, of the constitution of 1877 (Civ. Code, § 5779), simply because it does not "distinctly describe" or in any manner refer to the act of November 29, 1895 (Acts 1895, p. 394), upon which the act of 1898 operates.

Same—Same—Same—Title of Act.—The title to the above-mentioned act of 1898 is sufficiently comprehensive to embrace the provision in the body thereof relating to the clerk and sheriff of the

*See note at end of case.

city court of Savannah; and the body of the act does not, within the meaning of paragraph 8, § 7, art. 3, of the constitution of 1877 (Civ. Code, § 5771), contain matter different from what is expressed in its title, nor does it refer to more than one subject-matter.

SIMMONS, C. J., and LITTLE, J., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff from Chatham county superior court. *Affirmed.*

A. A. Lawrence and *Spencer R. Atkinson*, for plaintiff in error.

Denmark, Adams & Freeman, for defendant in error.

LEWIS, J. Plaintiff in error brought his petition to the superior court of Chatham county, making substantially the following case: In December, 1895, petitioner was elected by the mayor and aldermen of Savannah clerk of the city court of Savannah for a term of four years, beginning January 1, 1896. After the election, petitioner duly qualified, and continued to occupy the office from the 1st day of January, 1896, until the 12th of January, 1899. His election was by virtue of the provisions of the act of November 29, 1895 (Acts 1895, p. 394). The legislature of this state at its annual session of 1898 passed an act entitled "An act to fix the time for the election of all city officers now elected by the council of the mayor and aldermen of the city of Savannah, to provide for the terms of such officers, to terminate the terms of those now in office, and for other purposes," approved December 16, 1898. On the 11th of January, 1899, the mayor and aldermen of Savannah in pursuance of the last-mentioned act, elected Waring Russell, Jr., the defendant, to the office of clerk of the city court of Savannah, who thereafter, against the consent of petitioner, took possession of the office, and deprived the petitioner of the possession thereof; respondent still remaining in possession, and claiming title thereto under such election. The constitutionality of this act of 1898 was attacked in the petition and amendments thereto on the following grounds: (1) Because, the removal of an officer

being a judicial function, the legislature has no authority under any constitutional provision to accomplish that purpose by shortening petitioner's term of office; (2) because the act in question does not distinctly describe, or in any manner refer to, the act approved November 29, 1895, upon which it operates, and which it repeals, and to that extent violates paragraph 17, § 7, art. 3, of the constitution; (3) because the title to the act being limited to the fixing of a time for the election of city officers now elected by the mayor and aldermen, and the body of the act being extended to the fixing of a time for the election "of all city officers now elected by the council of the mayor and aldermen of the city of Savannah, including the clerk and sheriff of the city court of Savannah," the body of the act contains matter different from what is expressed in the title, and is to that extent violative of the provisions of the constitution contained in paragraph 8, § 7, art. 3, of the constitution of 1877. Petitioner also alleged that the body of the act contained more than one subject-matter. The prayers of the petition were that the election of Waring Russell, Jr., be declared illegal and void; that petitioner be allowed to file his petition in the nature of *a quo warranto*, and respondent be required to come into court and show by what authority he held the office, and by what right he occupied the same; that petitioner be declared the clerk of the city court of Savannah, duly and legally entitled to hold the same until January 1, 1900; and that a rule *nisi* issue, calling upon and requiring the respondent to show cause why the several prayers of the petition should not be granted, and the state's writ of *quo warranto* issue as prescribed by law in such cases. In response to this application the respondent appeared by his attorney, and demurred to the petition, and moved to dismiss the same upon the ground that it appeared from the application that the respondent legally held the office mentioned, and that petitioner set forth no cause or reason for the remedy for which he prayed. Upon the hearing the court sustained the demurrer, and ordered the application dismissed,

upon which judgment of the court plaintiff in error assigns error in his bill of exceptions.

1. There can be no question about the proposition that the legislative power of the state is absolute with respect to all officers that it creates, where no constitutional restriction is placed upon its power with reference to such officers. The incumbent of such an office does not hold the same by virtue of any sort of contract, express or implied, with the state or its lawmaking power which gives him a vested right in the office. He accepts the office subject to the control of it by any legislative action in reference thereto which might thereafter be taken. The legislature may abolish the office before his term expires, may modify its duties, may shorten or lengthen the term, and increase or diminish the salary, or change the mode of compensation. See Butler *v.* Pennsylvania, 10 How. 402, affirmed in Newton *v.* Commissioners, 100 U. S. 559; City Council of Augusta *v.* Sweeney, 44 Ga. 463. So well settled is this principle that further discussion or citation of authority on the subject is unnecessary.

Shortening Incumbents' Terms of Office—Constitutionality of Statute.

2. Another ground of attack upon the constitutionality of the act of 1898 is that it operates upon and repeals the act of 1895 (Acts 1895, p. 394), and that the former act, not referring to or specifically describing the latter, is obnoxious to paragraph 17, § 7, art 3, of the constitution (Civ. Code, § 5779). That provision in the constitution declares that "no law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made." The act in question does not purport to amend or repeal any particular law or section of the Code, but in general terms, indicated by its title, simply undertakes to fix a time for the election of certain officers, to provide for the terms of such officers, to terminate the terms of those now in

Same—Same—Same.

office, and for other purposes. By reference to several decisions of this court it will be clearly seen, without further argument, that this act is not obnoxious to the provision of the constitution above quoted. Reed *v.* McCrary, 94 Ga. 487, 21 S. E. 232; Bagwell *v.* Town of Lawrenceville, 94 Ga. 654, 21 S. E. 903; Johnson *v.* Association, 97 Ga. 622, 25 S. E. 358; Swift *v.* Van Dyke, 98 Ga. 725, 26 S. E. 59.

Same—Same—Same—Title of Act.

3. The main question in this case, however, and the one upon which counsel for plaintiff in error relied, is whether or not the act of 1898 is unconstitutional because it contains in the body thereof matter different from what is expressed in its title. It is insisted with much plausibility and force that the clerk and sheriff of the city court of Savannah are not city officers, and that the use of the words "city officers" in the title cannot indicate any purpose to deal with these two officers. The powers and duties of the city court of Savannah relate to the administration of state law, and it is doubtless true that that court is as much embraced within the judicial system of the state as any other court recognized by its constitution and laws. As now constituted, it has nothing to do with matters that solely concern the municipal affairs of the city of Savannah, and hence it is with force contended by counsel for plaintiff in error that the officers of that court cannot properly be designated as city officers. It is insisted that, in determining the classification of a particular office, reference should be had to the powers and duties of its incumbent, and to the objects and purposes for which the office was created. As a general proposition, we think this is true; and it may be conceded in this case that ordinarily, when mention is made of a city office, the mind would naturally conclude that reference was made only to such an office as pertains to, and is in some way connected with, the municipal affairs of a city government. But we do not think that it necessarily follows that such a rule of interpretation should be strictly and rigidly adhered to, especially in a case that involves the constitutionality of a

law passed by a co-ordinate branch of the government. Why should the duties of a particular officer, or the character of his office, determine the particular class in which it should be designated, any more than the source or tribunal by which the officer is elected, and from which he receives his commission to act? There are three general classifications of officers, under one or more of which, perhaps, would be included all the civil officers of this state, *viz.* state, county, and municipal or city officers. It is alleged in the petition in this case that the office of clerk of the city court of Savannah is a state and a county office. Now, let us apply a rigid rule of construction, and see, for instance, whether this officer could with any more propriety be classified as a county officer than a city officer. Applying the same rule insisted upon by counsel for plaintiff in error, in order to designate this clerk as a county officer his duties and the nature of his office should relate particularly and peculiarly to county matters; but the truth of the matter is that they are no more concerned with the affairs of the county of Chatham than the municipal affairs of the city of Savannah. The constitution of the state declares that "the county officers shall be elected by the qualified voters of their respective counties, or districts, and shall hold their offices for two years." Civ. Code, § 5929. If, then, the clerk of the city court of Savannah is a county officer, the petitioner in this case, who claims his office by virtue of an election of the mayor and aldermen of the city, and not by virtue of a popular election, has no title to it. If, therefore, the title to the act had been to change the terms of the county officers of the county of Chatham elected by the mayor and aldermen, we think, to say the least of it, that the act would have been just as obnoxious to the constitutional provision invoked as the act is now in its present shape. Now, let us see if, under the rigid sense of the term, he is a state officer. In section 228 of the Political Code it is declared that "all other civil officers of the state or county shall be commissioned under the seal of the executive department, signed by

the governor, and countersigned by one of his secretaries, except constables," etc. This language, taken in connection with sections 226 and 227 of the Political Code, it will be seen, would necessarily include the office of clerk of the city court of Savannah, provided that office, strictly speaking, is either a state or a county office. But this office is not filled either by appointment of the governor, or by a person commissioned by the governor. On the contrary, its incumbent is elected by the constituted authorities of the municipal government of the city of Savannah, receives from them his commission or certificate of election, and derives his power to act from that body. We refer to these provisions of the constitution and laws of the state with a view to showing that this particular office now under consideration would fall as properly under the classification of a city office as it would under that of either a state or county office, and of further showing that, where there is an undertaking by the legislature to embrace in general and comprehensive terms a particular office, it will not do to give its language the rigid and strict interpretation insisted upon in this case by counsel for plaintiff in error. We must look not only to the literal and technical rules upon the subject, but also to the general and common acceptation of terms. To illustrate: In many counties of this state the entire affairs of the county, in so far as they relate to those functions and duties pertaining to its separate political organization, are taken out of the hands of the ordinary, and placed into the hands of a board of commissioners. In such counties these officers are more properly speaking county officers than is the ordinary, that officer's duties in those instances not at all relating to county affairs, but pertaining strictly to the administration of state laws; and the court of ordinary is in such instances as much a part of the judicial system of the state as is the city court of Savannah. Yet, under the general understanding with reference to who constitute county officers, an act of the legislature changing generally over the state the terms or time of election of county officers, we think, would certainly apply

to the ordinaries of those counties in which, strictly speaking, they are not county officers. It is highly proper, therefore, in considering the question as to whether or not the words "city officers" can be properly construed to embrace the particular office now under consideration, to inquire whether or not any reason has ever existed for so classifying this office; and, as throwing a flood of light on this question, the history of the city court of Savannah from its early inception may well be looked to and considered.

By virtue of an act of a general assembly of the state approved February 18, 1796, there was organized for Savannah what was known as the "Mayor's Court," and upon that court was conferred jurisdiction over civil cases arising under state laws, to a certain amount. That court thereafter became one embraced in the judicial system of the state. Watk. Dig. 589. In several acts of the legislature passed after the organization of that court, its clerk and sheriff were treated as city officers. To show this, it is only necessary to cite two or three of these acts. On November 29, 1806, there was passed an act "to regulate the election of aldermen of the city of Savannah and the city "officers," etc. Under the classification of "city officers," was included the clerk of the mayor's court, and it was provided by the act that he should be elected by the people. Clayt. Dig. 311, 312. On May 23, 1808, a law was passed entitled "An act to alter the mode of electing the city officers of the city of Savannah." The body of that act conferred upon the mayor and aldermen of the city the power to elect the sheriff and the clerk of the mayor's court, as well as the city marshal and the clerk of the council. *Id.* 435. On December 18, 1819 (Lamar, Dig. p. 387), an act was adopted for the organization of a "court of common pleas and of oyer and terminer for the city of Savannah." This act provided that that court should have jurisdiction of all civil cases not exceeding in amount the sum of $200, or less than $30, and also jurisdiction of all minor offenses against the state of Georgia not punishable by confinement in the penitentiary. In section

12 of that act it was provided that the clerk and sheriff of the mayor's court should be clerk and sheriff of the court created by the act. Section 14 provided that the mayor and aldermen should furnish the clerk with a book in which to record the proceedings of the court. Section 15 charged the clerk with all the duties and liabilities attached to the office of clerk of the superior and inferior courts. Under section 18 he takes the same oath, and under section 23 all suits then pending in the mayor's court were transferred to the court organized under the act. In other words, the act establishing this court of common pleas and of oyer and terminer made that court as purely and strictly a state court, having jurisdiction and cognizance of matters pertaining to state law, as the present court of the city of Savannah now has or has ever had. Yet we find in subsequent acts of the legislature that these very officers were treated as city officers. For instance, the title to the act of December 13, 1820 (Dawson, Comp. p. 429), was "An act to render legal and valid the election of city officers for the city of Savannah," and to amend an act passed the 23d of May, 1808, entitled "An act to alter the mode of electing city officers of the city of Savannah." In the body of that act (section 2) we find among the officers thus classified as city officers the sheriff and clerk of the court of common pleas and of oyer and terminer for the city of Savannah, and provision was made for these officers holding their offices for a term of three years. The present city court of Savannah derived its name from an act passed on December 9, 1853 (Acts 1853–54, p. 281). The title to that act was "An act to amend the several acts relating to the court of common pleas and of oyer and terminer of the city of Savannah, and for other purposes." In the body of the act all laws applicable to the court of common pleas and of oyer and terminer of the city of Savannah, not conflicting with the act, were made applicable to the city court of Savannah. All officers of the former court then in office held their offices as if the act had never been passed. The nature of the court, which had existed

from 1819 to December, 1853, was not changed; the only effect of the act being to change the name of the court and the extent of the jurisdiction. Under the act of 1857 (Acts 1857, p. 115), embodied in section 4961 of the Code of 1882, a new feature was introduced in the law touching the city court of Savannah, empowering the judge of that court, in conjunction with the mayor of the city of Savannah, to select five members of the mounted or foot police of the city as special bailiffs of the court, who should remain such bailiffs for one year, unless sooner removed by the judge, or unless in case of dismissal or resignation from the police force. By virtue of this act, it will be seen, the administration of law in that court was still more intimately associated with the appointing power and supervision of the mayor,—the officer at the head of the municipal government. After the organization of the city court of Savannah, it seems that by order of the city council of Savannah all the laws of the state of Georgia referring to this city were codified by the city attorney. In the codification of these laws was included the several acts pertaining to the city court of Savannah. By virtue of the act of December 19, 1860 (Acts 1860, p. 24), the legislature provided that all these acts thus codified should be made a part of the Code of Georgia; and they were accordingly embodied in an appendix to every Code of this state, down to and including the Code of 1882. The acts relating to the city court of Savannah have thus been treated by the legislature as a part of the laws relating to that city. The object of the constitutional provision invoked in this case was to prevent surreptitious legislation. In view of all this history touching the city court of Savannah, we are not prepared to say that the title of the act of 1898 was calculated to mislead either the representatives of the county of Chatham in the general assembly, or the members of the community generally, who were particularly, and we may say exclusively, affected by this legislation. It is unnecessary to lengthen this opinion by any special reference to the various ordinances of the city of Savannah,

which clearly treat the offices of clerk and sheriff of the city court as city offices. Of these ordinances this court will take cognizance equally with the acts of the legislature above referred to, by virtue of a special act of the legislature (Acts ————).

In view, therefore, of the history of legislation bearing upon the city court of Savannah; in view of the fact that it originally sprung up as one of the institutions of that city, and that its officers have been referred to both by the legislature of this state and by the municipal legislature of Savannah as city officers; and in view of the further fact that the clerk of that court is still appointed and commissioned by the council of the mayor and aldermen of that city, who have power to administer to him the oath of office, to whom his official bond is made payable, and on which no action can be maintained except in the name of the mayor and aldermen; and finally in view of the fact that all legislation relating to the nature of that court and the powers and duties of its officers have been embodied in its code of laws, and treated by the legislature of this state as laws peculiar to that city, —we do not think that it is a strained construction of the act of 1898 to say that the words, "All city officers now elected by the council of the mayor and aldermen of the city of Savannah," include by their comprehensive terms the office of clerk of the city court of Savannah. It necessarily follows from the above that the act under consideration does not refer to more than one subject-matter, within the meaning of the constitution. Civ. Code, § 5771.

We have examined carefully several authorities cited by counsel for plaintiff in error, but we do not think any of them are in point, as none of them involved the particular constitutional question presented by this record. In the case of Whitmore *v.* Mayor, etc., 67 N. Y. 21, it appeared that the act in question was entitled "An act to reorganize the local government of the city of New York." The body of the act authorized the board of apportionment to fix the salaries of

all officers paid from the city treasury. It was decided in that case that the clerks of the district court of the city were not such officers, but judicial officers embraced within the judicial system of the state. In the first place, a marked difference between the title to that act and that of the one we are now considering will be noticed. There would be some similarity between the cases if the title to the Georgia act of 1898 was to change the terms of such city officers whose duties relate to the local government of the city of Savannah. But that case does not decide any constitutional question growing out of the contention that the body of the act contains matter different from what is expressed in its title. On the contrary, it is stated in the report of the case that the constitutional question was not considered. The effect of the decision is that, construing the body of the act in connection with its title, it was not within the purview of the legislature, even by the terms used in the body of the act to refer to the particular office in question, to wit, the office of clerk of the district court of the city. The decision in the case of Harris *v.* People, 59 N. Y. 599, is more nearly in point. It was held in that case that an act entitled "An act to revise the charter of Long Island City" was sufficiently comprehensive to embrace a provision in the body creating a city court. It appeared that the powers conferred upon that court related to the administration of state law. That case involved the trial of a person accused of the offense of burglary,—a violation of the criminal law of the state of New York,—and it was held that the act was not contrary to the provisions of the state constitution declaring that "a local act shall embrace but one subject and that shall be expressed in its title." In the case of State *v.* Bus (Mo. Sup.) 36 S. W. 636, it appears that there was a constitutional provision in Missouri declaring that "in cities or counties having more than two hundred thousand inhabitants, no person shall at the same time be a state officer and an officer of any county, city, or other municipality, and no person shall at the same time fill two municipal offices, either in the same or different municipali-

ties." It was decided in that case simply that a deputy sheriff was not a "state officer," within the meaning of that provision of the constitution, nor did he as such deputy hold office under the city, and therefore he was not prohibited from holding the office of school director in such city. Another case relied upon by counsel for defendant in error is the case of Kahn *v.* Sutro (Cal.) 46 Pac. 87. It appears in that case that the incorporated limits of the city of San Francisco were extended throughout a territory known as the "County and City of San Francisco." It was simply decided that the territory within which the municipal government was exercised was still a part of the state, and for all purposes other than municipal government subject to the state's control, with the right on the part of the state to authorize the election therein of such officers as may be required to execute its general laws, or to perform such function, disconnected with the municipal government, as may pertain to the government of the state, and that hence the city and county of San Francisco was within the provisions of the county government act, declaring what county officers shall be elected, prescribing their duties, and fixing their tenure of office. The fact that such officers of the state lived within the municipality would certainly not prevent their proper designation as state or county officers, and that is, in substance, the effect of the ruling of the supreme court of California in the case just cited. It might be conceded, for the sake of the argument, that the clerk of the city court of Savannah could with propriety be designated as a state or county officer, under the ordinary meaning of those terms; but it does not follow that he could not be, with equal propriety, in view of the reasons above given in this opinion, designated also as a city officer.

The question before us is not entirely free from its doubts and difficulties, but the very existence of a reasonable doubt upon the subject of the constitutionality of an act of the legislature should be an end of the argument. It is a rule of law recognized by all standard authority on the subject, to

such an extent that it may be regarded as an elementary principle, that it is the duty of courts to sustain the constitutionality of acts passed by a co-ordinate branch of the government, unless they are plainly and palpably violative of some provision of the organic law of the state, and, if there is a reasonable doubt on the subject, this doubt should always be resolved by the courts in favor of the legislative branch of the government. Carey *v.* Giles, 9 Ga. 253; Churchill *v.* Walker, 68 Ga. 681; Wellborn *v.* Estes, 70 Ga. 390; Howell *v.* State, 71 Ga. 224. Judgment affirmed. All the justices concurring, except SIMMONS, C. J., and LITTLE, J., dissenting.

LUMPKIN, P. J. (concurring specially). While I have serious doubt of the soundness of what is laid down in the third headnote. I assent thereto, believing it to be my duty so to do, under the doctrine stated at the conclusion of the foregoing opinion, *viz.* that, as a rule, doubts as to the constitutionality of a legislative act should be resolved in favor of its validity.

SIMMONS, C. J., and LITTLE, J. (dissenting). 1. Even though, in an act of the legislature creating a public office, it is provided that the incumbent thereof shall be elected by, and give bond payable to, the mayor and aldermen of a city within which he is required to perform his official duties, if the duties imposed upon him relate exclusively to matters connected with the administration of some general public function, and in no wise involve the performance of any function connected with the administration of the municipal affairs of such city, a person elected to fill such office is not an officer of such city, and does not fall within the class of persons embraced within the meaning of the term "City Officers," occurring in the caption of a subsequent act of the general assembly, and employed for the purpose of describing a class of persons intended to be affected by its provisions.

2. The clerk and sheriff of the city court of Savannah are public functionaries, whose duties relate exclusively to

matters involved in the administration of the general public justice. They are neither authorized nor required to perform any official function connected with the administration of the municipal affairs of the city of Savannah. They are therefore not officers of that city. And consequently the act of the general assembly approved December 16, 1898, which is entitled "An act to fix the time for the election of all city officers now elected by the mayor and aldermen of the city of Savannah, to provide for the terms of such officers, to terminate the terms of those now in office, and for other purposes," in so far as its provisions relate to the terms of office of the clerk and sheriff of the city court of Savannah, contains matter different from that expressed in the title, and is for that reason unconstitutional and void.

NOTE.

Public Officers—Term of Office—Legislative Control.—The legislature may increase or diminish the term of an office created by statute. Butler *v.* Pennsylvania, 10 How. (U. S.) 402; Prince *v.* Skillin, 71 Me. 361, 36 Am. Rep. 325; People *v.* Haskell, 5 Cal. 357; Territory *v.* Pyle, 1 Ore. 149; People *v.* Auditor, 2 Ill. 537; Walker *v.* Peele, 18 Ind. 264; People *v.* Banvard, 27 Cal. 470; Taft *v.* Adams; Pom. Const. Law § 553. See *contra*, Hoke *v.* Henderson (N. Car.) 4 Dev. Law 1, 25 Am. Dec. 677.

MAYER

v.

SWEENEY.

(*Supreme Court of Montana, Jan. 24, 1899.*)

Eligibility to Office.—Under the laws of Montana, a person to be eligible to the office of mayor of a city must be a "taxpaying freeholder." *Held*, that it is not required that such person shall be a freeholder who is subject to the payment of taxes on his freehold for that year at the time of his election to the office of mayor.

Mayer *v.* Sweeney

APPEAL by contestant from Cascade county district court. *Affirmed.*

Lyter & Gormley, for appellant.
Stanton & Stanton, for respondent.

PIGOTT, J. At a municipal election held in Neihart on April 4, 1898, David Sweeney received a majority of the votes cast for mayor of that town, and a certificate of election was issued. The contestant then instituted proceedings under section 2010 of the Code of Civil Procedure, to contest the title of Sweeney to that office. The court found the issues in favor of the contestee, Sweeney, and adjudged that he was lawfully entitled to the office. Contestant appeals.

The statement of contest contains the averment that Sweeney "has no right to said office, and is ineligible to the same for the reason that he was not at the time of said election, nor is he now, a taxpaying freeholder, within the limits of said town of Neihart." Of this allegation denial was made; and, upon the issue thus framed, the court, after hearing evidence, found that Sweeney was not the owner of any freehold in Neihart in 1898 prior to March 19th of that year, on which day he acquired title to a lot of land therein; that he had paid no taxes, and was not subject to taxes, on any real estate for 1898; that in 1897 he owned, and payed taxes on, real and personal property situate in Neihart; and that on the first Monday of March, 1898, he was, and continued to be, the owner of personal property in Neihart, duly assessed and listed to him.

The single question presented is whether or not on April 4, 1898, Sweeney was "a taxpaying freeholder," within the meaning of section 4749 of the Political Code, which provides: "No person shall be eligible to the office of mayor unless he shall be at least twenty-five years old and a taxpaying freeholder within the limits of the city and a resident of the state for at least three years, and a resident of the city for which he may be elected mayor two years next preceding his election to said office, and shall reside in the city or town for which

he shall be elected mayor during his term of office." Property is assessed to the person owning it on the first Monday of March in each year, and the taxes on real estate are due and payable in the December following; and appellant contends that the phrase "taxpaying freeholder within the limits of the city" or town must be interpreted to mean a freeholder who is subject to the payment of taxes on his freehold at the time of his election to the office of mayor,—in other words, that the mayor, when elected, must own, and have owned on the first Monday of March preceding his election, an estate of inheritance or for life within the limits of the town, so as to be a taxpayer upon that freehold, and that since Sweeney did not acquire the real estate mentioned until March 19, 1898, he was not subject to taxation on that property on the first Monday of March, and that hence he was ineligible. Respondent, on the contrary, maintains that if, at the time of his election, he owned a freehold within the limits of Neihart, and was subject to taxes upon property, either real or personal, situate in that town, he was eligible, under section 4749. The facts are undisputed. As has been said, Sweeney was a freeholder and a taxpayer on personal property, which personal property, as well as the freehold, was situate in Neihart; but on the first Monday of March he was not a freeholder, although he paid taxes the year preceding upon personal property within the limits of the town, and on the first Monday of March, 1898, owned personal property in Neihart, assessed to him.

Necessity of inquiring whether the liability of Sweeney to a tax other than that assessed upon real or personal property (for example, a poll tax) would be a requisite to his eligibility is obviated by the finding that he was at the time of his election a payer of taxes upon chattels; and for the purposes of this case we assume, but do not decide, that unless he was, when elected, subject to the payment of taxes on property situate in Neihart, he was ineligible. The legislature doubtless intended to prescribe such requisites for eligibility to mayoralty as would tend to prevent those having no sub-

stantial interest in the well-being and prosperity of a municipality from holding its chief executive office, and, to that end, provided that the mayor must be at least 25 years of age, a resident of the state for not less than 3 years and of the city for 2 years immediately prior to his election, and that he must, while mayor, reside in the town, and, also, that he must be "a taxpaying freeholder within the limits of the city" or town. When the meaning of the phrase quoted shall have been ascertained, the question in this case is solved. "Taxpaying freeholder within the limits of the city" or town does not mean that the taxpayer must reside within the municipality, for another portion of the section makes such residence for two years essential to eligibility. The phrase must be interpreted, therefore, to mean either that the mayor must, at the time of his election, own a freehold within the limits of the town, for the payment of taxes whereon he is liable, or that he must, when elected, be the owner of a freehold situate in the town, who pays taxes, or is liable to the payment of taxes, upon property the situs of which is in the town. The design of the legislature is to be found in the language employed to give expression to its will; and while the phrase under consideration is not wholly free from ambiguity and uncertainty, and may be susceptible of two interpretations, yet the intention is reasonably manifest. It seems quite evident that the words "a taxpaying freeholder" signify a freeholder who pays taxes, and that "a taxpaying freeholder within the limits" of the town clearly signify the owner of a freehold situate in the municipality, who is liable to the payment of a tax, which, as assumed for the present purposes, must be upon property lying within the limits of the town. We are of the opinion that, in the expression "taxpaying freeholder," the word "taxpaying" is used to distinguish between a freeholder who is liable for the payment of taxes and one who is not, and that it qualifies "freeholder." The intent is to describe a freeholder who is also a taxpayer; and we think that the phrase "a taxpaying freeholder within the limits" of the town does not contain the implication that

a person, to be eligible, must pay, or be liable for, the taxes on a freehold within the town; nor are we authorized to read the words as if they were written "a taxpayer on a freehold owned by him in the town." We may not say that the phrase quoted is so limited in its meaning as to include a person paying, or liable for the payment of, taxes on one class of property only, to the exclusion of another. The meaning sought by contestant to be attached to the language of the section is somewhat strained, and is in disregard of grammatical construction. It is for the legislative department, not for the courts, to declare that he who pays taxes, no matter how small in amount they may be, on lands only, has thereby a stronger motive to advance the cause of good government, and greater fitness for an office, than has a freeholder who contributes to the support of the municipality by the payment of taxes assessed on personalty only. The district court found that the contestee, at the time of his election, owned a freehold lying in Neihart, and was at that time subject to the payment of a tax on personal property therein situate, and this satisfies the requirement of the statute that the mayor must be a taxpaying freeholder, within the limits of the town.

The suggestion that the construction placed upon section 4749, *supra*, by the court below, would permit the merely nominal acquisition of a freehold by a candidate for mayor, with an understanding that the paper title thereto would be reconveyed by him after election, so as to give color of eligibility, needs no comment. Such a condition is not presented here, and therefore consideration of the possible question as to whether that circumstance would be deemed an unsuccessful attempt to evade the statute is not involved. The judgment of the district court of Cascade county is therefore affirmed. Let *remittitur* issue forthwith. Affirmed.

BRANTLY, C. J., and HUNT, J., concur.

McCain *et al.*

v.

City of Des Moines *et al.*

(*Supreme Court of the United States, May 1, 1899.*)

Federal Jurisdiction—Pleading.—A bill based upon an alleged controversy and a suit of a civil nature arising under the constitution and laws of the United States, in order to show federal jurisdiction, must set forth a real and substantial dispute as to the effect or construction of the constitution, or of some law of the United States, upon the determination of which the recovery depends.

Same—Validity of City Government—Void Statute—Estoppel—State Decision Conclusive.—The bill was filed to obtain an injunction restraining, among other things, a city from exercising under a law which had been declared void by the supreme court of the state, any function of municipal government for the purposes of taxation over an incorporated town. But the supreme court of the state, while holding that such law, which purported to extend the limits of the city so as to include the town, was void, had decided that the doctrine of laches or estoppel applied to sustain the validity of the city government over the illegally annexed town. It appeared from the bill that all the parties to the controversy were citizens of the state. *Held*, that the bill presented no federal question; and that to grant the relief demanded would be to overrule the state court upon a question relating purely to the local law of the state.

Appeal by plaintiff from the Circuit Court of the United States for the Southern District of Iowa. *Affirmed.*

Case Stated.

The bill in this case is filed against the city of Des Moines, its board of public works, the Des Moines Brick-Manufacturing Company, and the incorporated town of Greenwood Park, to obtain an injunction restraining, among other things, the city of Des Moines and its officers and agents from exercising over the territory of the incorporated town of Greenwood Park any function of municipal government for the purpose of taxation, or for

works of internal improvements or otherwise, and for other relief.

The bill makes the following allegations: The complainants own in severalty lands within the incorporated town of Greenwood Park, and the lands so owned by each of the complainants are worth more than $2,000. Adjoining the town is the city of Des Moines, a municipal corporation created under the laws of the state of Iowa. In 1890 the legislature passed an act purporting to extend the limits of the city of Des Moines so as to include therein the town above named. The constitution of the state prohibits the passing of special acts for the incorporation of cities. The act of 1890 was a special act incorporating a city, and therefore prohibited by the constitution, and, as a consequence, entirely void. The incorporated town has never been dissolved, and is entitled to exercise all the functions of government and taxation, but it has ceased to exercise them over the territory. That, notwithstanding the act of 1890 is wholly void, and of no effect, the defendant the city of Des Moines pretended and undertook to exercise the functions of government and the power of taxation over the territory of Greenwood Park. That the only warrant for the city to act in the premises is the void act of the legislature of 1890, and the city is assuming to levy assessments, and to exercise the power of taxation, and to perform all the other functions of municipal government under that act. That the suit herein is one of a civil nature, arising under the laws and constitution of the United States, and the sum in controversy exceeds $2,000. It appears on the face of the bill that all the parties are citizens of the state of Iowa.

The bill further alleges that the city made a contract with the defendant the Des Moines Brick-Manufacturing Company to pave a public highway in the town, the expense of which was to be assessed upon the property abutting thereon, including the lands of the complainants, and the work was all done under color of the act mentioned, and that it was all illegal for want of authority; that at the time of the passage

of the act and the taking of jurisdiction by the city the town was exclusively an agricultural community, and there was no advantage in or necessity for the annexation of the town to the city of Des Moines, and none of the land in the town had been plotted into lots by laying out streets or alleys therein, and the highways within it were under the control and jurisdiction of the officers of Polk county; and that to subject the lands of complainants or the other lands within the town to the taxes and assessments threatened by the city of Des Moines is to take their property under color of authority from the void act of 1890, and contrary to the amendment of the constitution of the United States (article 14, § 1).

Further allegations were made, not material to be stated.

In addition to asking for an injunction to restrain the city of Des Moines from exercising jurisdiction over the town of Greenwood Park, the complainants ask that the town "be enjoined to exercise for its own future benefits under the statutes of Iowa all functions of municipal government and taxation and works of internal improvement in the same manner and to the same extent as the said functions have been exercised by said defendant prior to March 3, 1890." The bill further prayed that the city and the board of public works should be enjoined from making any levy upon the property of the complainants to pay the expense of paving the highway, and that the city be restrained from issuing to the Des Moines Brick-Manufacturing Company any assessment certificates on account of paving, and for other relief.

The defendant the Des Moines Brick-Manufacturing Company demurred to the bill on the ground, among others, that it appeared on the face of complainants' bill that all the parties to the suit were citizens of the state of Iowa, and that this suit does not involve any question arising under the constitution or laws of the United States, and therefore the circuit court had no jurisdiction in the case.

The circuit court sustained the demurrer on the ground of want of jurisdiction, and, pursuant to section 5 of the act of

1891, organizing the circuit courts of appeal (26 Stat. 826), it has certified the question of jurisdiction alone for decision by this court.

The opinion of the district judge in dismissing the bill is reported in 84 Fed. 726.

Wm. E. Mason, for appellants.
N. T. Guernsey, for appellees.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

The jurisdiction of the circuit court depends upon the act approved August 13, 1888 (25 Stat. 433), a part of which reads as follows: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, * * * arising under the constitution or laws of the United States. * * * "

As it appears upon the face of the bill that all the parties are citizens of Iowa, the circuit court had no jurisdiction on the ground of diverse citizenship.

Is the suit one arising under the constitution or laws of the United States? As was said in the court below, the material question is whether the exercise of jurisdiction by the city of Des Moines over the territory purporting to be annexed by the act of 1890 is lawful. To answer that question, it is necessary only to refer to the constitution and law of the state of Iowa.

The supreme court of the state decided in State *v.* City of Des Moines, 96 Iowa, 521, 65 N. W. 818, that the act of 1890 was void, because it violated the constitutional provision in regard to special legislation. That was an action of *quo warranto*, brought to test the right of the defendant city to exercise corporate authority over the added territory under the act of 1890. From the report of the facts in that case it appears that the city was by that act extended 2½ miles in each direction from its then present boundary, and it was provided by the same act that the corporate character

of any annexed territory within the extended boundaries should cease and determine upon the passage of the act. Other sections of the act provided for the payment of the indebtedness of the city so enlarged, and of the indebtedness of the cities within the annexed territory, and for the exemption from taxation for any city purpose of lands included within the extended limits which had not been laid off into lots of 10 acres or less, or which should not subsequently be divided into parcels of 10 acres or less by the extension of streets and alleys or otherwise, and also of lands occupied and used in good faith for agricultural or horticultural purposes; for the reorganization of the wards of the cities, and for elections therein. It appeared from the census of 1885 that only the city of Des Moines was affected by the act of 1890, and that in the added territory were one city and seven incorporated towns. The provisions of the act by which the municipal governments, other than the city of Des Moines, were to become extinct, and the entire territory to become one corporation and municipality, were observed, so that in April, 1890, the change was complete, since which time the city of Des Moines has been thus constituted, and has exercised throughout the territory the rights and functions of a city government, including the levy and collection of taxes, establishing, opening, vacating, changing, and improving streets, the making of contracts, and the creating and payment of debts.

These details, while appearing in the report in 96 Iowa, 65 N. W., are not set up in the complainants' bill, but their substance is shown in the allegations therein made, that the town has ceased to exercise all the functions of government and taxation, and the city of Des Moines and the board of public works are themselves exercising the functions of government over the town territory.

After the court in the *quo warranto* case had determined that the act was local legislation, and of that class prohibited by the constitution, and therefore void, the opinion therein continues as follows:

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"It is next to be determined whether or not, with the law giving rise to the annexation absolutely void, the legality of the present city organization can be sustained under the rule of estoppel or laches. On this branch of the case a large number of authorities have been cited, and the newness of the question, as well as the great interests involved, make it one of great importance. The foundation for the application of the doctrine of estoppel is the consequence to result from a judgment denying to the city of Des Moines municipal authority over the territory annexed after the lapse of four years, during which time such authority has been exercised, and the changed conditions involving extensive public and private interests. It will be remembered that the act of annexation resulted in the abandonment of eight municipal governments, which, before the annexation, were independent, and bringing them under the single government of the city of Des Moines. This involved a vacation of all offices in the city and towns annexed, and the delivery of all public records and property to the officers chosen for the city so enlarged. For four years taxes have been levied, collected, and expended under the new conditions; public improvements have been made, including some miles of street curbing, paving, and sewerage, for which certificates and warrants have been issued, and contracts are now outstanding for such improvements. In brief, with the statement that for the four years the entire machinery of city government has been in operation, the situation may be better imagined than expressed. It is hardly possible to contemplate the situation to result from a judgment dissolving the present city organization, and leaving the territory formerly embraced within corporate lines as it would be left. Of all the cases to which we are cited, involving the validity of municipal organizations, where the consequences to result from a judgment of avoidance are considered, not one presents a case of such uncertainty, nor where there are the same grounds for serious apprehension, because of difficulties in adjusting rights in this case."

The court then cited several cases in which the doctrine of laches had been applied to sustain a municipal government where the organization, as attempted, was illegal. See State *v.* Leatherman, 38 Ark. 81; Jameson *v.* People, 16 Ill. 257; People *v.* Maynard, 15 Mich. 463; and also the following from Cooley, Const. Lim. (4th Ed.) p. 312:

"In proceedings where the question of whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appears to be acting under color of law, and recognized by the state as such. * * * And the rule, we apprehend, would be no different if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, and private parties could not enter any question of regularity. And the state itself may justly be precluded, on principles of estoppel, from raising any such objection, where there has been long acquiescence and recognition."

Continuing with its own opinion, the court stated:

"This, it is true, is a direct proceeding by the state. And, while the language used is applied in part to collateral proceedings, it seems also to include actions by the state directly. The learned writer sustains this text by a reference to People *v.* Maynard, *supra*, Rumsey *v.* People, 19 N. Y. 41, and Lanning *v.* Carpenter, 20 N. Y. 447. It will be seen that importance is given to the fact that the defective organization takes place under color of law. Nothing less can be said of the annexation in this case than that it was made under color of law. 'Color of law' does not mean actual law. 'Color,' as a modifier, in legal parlance, means 'appearance, as distinguished from reality.' Color of law means 'mere semblance of legal right.' Kin. Law Dict. & Gloss. In some of the cases the defects as to organization have been spoken of as irregularities, because of which appellant thinks the cases not applicable, because this is a void proceeding. The term 'irregularity' is oftener applied

to forms or rules of procedure in practice than to a nonobservance of the law in other ways, but it has application to both. It is defined as a 'violation or nonobservance of established rules and practices.' The annexation in question was a legal right under the law, independent of the act held void. It was not a void thing, as if prohibited by law. The most that can be said is that the proceeding for annexation was not the one prescribed, but it was a violation or nonobservance of that rule or law. It seems to us that the proceeding is no less an irregularity than in the cases cited."

And again on page 536, 96 Iowa, and page 823, 65 N. W., in speaking of the invalidity of the act of 1890, the court said:

"Had the act never been passed, and the same method for annexation been adopted, with the same conditions as to recognition, acquiescence, delays, and public and private interests involved, the same conclusion would result; and hence the act is without the least significance, nor have we given it a shadow of bearing, except in so far as it may have served as a color of law inducing the proceedings for annexation."

And, lastly, in speaking of the consequences to be apprehended from a judgment of ouster, the learned court said:

"Such a judgment would disrupt the present peaceful and satisfactory arrangement of all the people of the city as to its corporate existence, without a benefit, so far as we know, to any person. The law does not demand such a sacrifice for merely technical reasons. In fact, the constitutional vindication is complete with the declaration that the act is absolutely void."

It will thus be seen that, while the supreme court of Iowa decided that the act purporting to extend the limits of the city was void as being in violation of the constitutional provision in regard to special and local legislation, yet the court also held, for the reasons stated, that it was sufficient in itself to constitute, under the circumstances mentioned, a color of law for the annexation, and for the application of the principles of estoppel as above mentioned. The legality

of the present city organization was for those reasons sustained. It is this same organization that the complainants now ask to have enjoined in this suit from exercising any function of government in the annexed district, and the former organization in the annexed district, which the complainants allege has ceased to exercise those functions, they now ask the court in this suit to enjoin it "to exercise for its own future benefits under the statutes of Iowa."

To grant the relief demanded would quite effectually overrule the decision of the state court upon a question relating purely to the local law of the state.

The claim of the complainants is based solely and wholly upon the allegation that the act of 1890 was void as in violation of the constitution of Iowa. Their counsel lay that down in so many words in their brief. They say that their claim is "that under a law declared to be void and unconstitutional by the supreme court of the state of Iowa the city of Des Moines is still exercising municipal control and jurisdiction over the complainants' property." There is an allegation in the bill that the land of the town was agricultural, but it is not asserted that the act was a violation of the federal constitution because it included such lands. No such question is made by the bill.

In their brief, counsel urge that the act was void, because, among other things, it was a violation of the constitution of Iowa in bringing agricultural lands, under the circumstances and to the extent mentioned, into the control and limits of the city. The act itself in the third section exempts such lands from taxation for any city purpose when they shall in good faith be occupied and used for agricultural or horticultural purposes.

It is therefore quite plain that the complainants base their case upon the allegation that their property is about to be taken from them by the city authorities without due process of law, and in violation of the constitution of the United States, because the act of 1890 violates the constitution of Iowa. That is a question of law, depending for its solution

upon the law of Iowa, and as to what that law is the federal courts are bound in such a case as this by the decision of the state tribunal. There is no construction of the federal constitution involved in that inquiry, nor any question as to its effect upon the complainants' rights in this suit. The question whether their property is taken without due process of law must be decided with sole reference to the law of Iowa. How can it be said, upon such facts, that any question arises under the constitution or laws of the United States? The claim of the complainants will not be defeated by one construction of that clause in the constitution or sanctioned by the other. Starin *v.* City of New York, 115 U. S. 248, 6 Sup. Ct. 28. There is no dispute about construction in any way whatever; the only question is as to the validity of the city organization, which, as stated, is a matter of state law.

The case is, however, made still stronger by the fact that the validity of the present organization of the city government and the lawfulness of its exercise of jurisdiction over the territory mentioned has been already decided by the state court, and had been so decided when this suit was commenced. It is not important upon what ground the state court proceeded in arriving at its judgment,—whether it was because the act of 1890 was valid, or that, being invalid, the lawfulness of the organization could not be inquired into for the reasons stated in the opinion of the court above quoted. The complainants, however, argue that the state supreme court in the *quo warranto* case did not decide upon the validity of the city organization, but only that the relator, being a nonresident of the city, and paying taxes in the town in the nominal sum of a dollar a year, would not be heard upon a question which might disturb the peaceful relations that existed in the territory, and which might also overturn the municipal authority of the city of Des Moines therein. Counsel allege that these complainants do not attempt to test the corporate existence of the city of Des Moines, but simply to test the right of that corporation to levy taxes for certain purposes upon the property of the complainants.

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The last assertion, so far as concerns the testing of the corporate existence of the city in the territory mentioned, is clearly an error, because the bill asks relief in the way of a perpetual injunction to restrain the city of Des Moines, its officers and agents, from the exercise of any function of municipal government or authority or jurisdiction for the purpose of taxation or for works of internal improvement in the town of Greenwood Park, and it asks that the city officers be perpetually restrained from interfering with the officers of the town, or from obstructing them in the administration of the municipal affairs of the town, and that the town "be authorized and enjoined to exercise for its own future benefits under the statutes of the state of Iowa all functions of municipal government, taxation, and works of internal improvement, in the same manner and to the same extent as the said functions have been exercised by defendant prior to the 3d day of March, 1890." This prayer for relief seeks to test pretty substantially the corporate existence of the city of Des Moines in the territory in question. It does, of course, also seek to test the right of the corporation to levy taxes for the purposes named in the bill, and upon the property of the complainants; but the right to levy these taxes depends entirely upon the legality of the city organization, so that, if the organization is not lawful, the taxation is equally invalid.

The commencement of this suit is plainly an attempt to overturn the decision of the state court in the *quo warranto* case. In our opinion, the complainants take much too narrow a view of the decision of the state court in that case. The facts of the nonresidence of the relator and the smallness of his interest were spoken of, but they formed only an insignificant part of other and more important facts upon which the reasoning of the court was based. Those other facts were of a public nature, and the court, in its opinion, gave great weight to the public interests that were involved, and the great injury that would fall upon all public as well as private interests by overturning an authority that had

lasted four years, and which had been initiated under color and by reason of an act of the legislature. The court in truth decided that the legality of the city organization could not be inquired into, even in a direct proceeding brought by the state to test the validity of the act; or, in other words, the validity must be sustained for the following, among other, stated reasons: The lapse of time, the actions of the authorities of both city and town in taking and yielding possession and jurisdiction, the delivery of all public records and the closing of all public offices by the officers in all the abandoned municipal governments, the levying, collection, and expenditure of taxes, the public improvements made after the passage of the act, the bonds that had been recalled by the city and others issued in their place, the general recognition of the validity of the municipal government by all classes of the community, the color of law under which the organization of the city government had been practically effected in the territory, and the inextricable confusion into which the whole affairs of the city and town would be thrown as the necessary result of holding that the city government did not extend over the territory mentioned. For these public considerations the court refused to permit the inquiry to be made, even by the state, into the validity of the municipal government of the city as enlarged under color of the act of 1890. That no collateral inquiry would be permitted the opinion takes as unquestionably plain.

For the purpose, probably, of meeting the argument arising from acquiescence, as set forth in the *quo warranto* case, the complainants allege in the bill herein that they and the citizens of Greenwood Park have not assented to or acquiesced in or agreed to the acts of the city of Des Moines, and that jurisdiction has been exercised over them without their consent, and without permitting the citizens, by election or otherwise, to determine whether the pretended acts of annexation should be operative or not. These allegations would seem to refer to the state of mind which the complainants and citizens were in during these many years, and the allegation of an absence

of acquiescence would also seem to have been founded upon the fact that there had been no election by which to determine whether the act should be accepted or not. Neither fact alters the effect to be properly given the opinion in the case mentioned, in the face of the facts actually existing. From the time of the passage of the annexation act up to the commencement of this suit, a period of seven years, there is no allegation of any act on the part of the complainants or any other citizen in the way of an attempt to test the validity of this legislation, with the exception of the suit brought by the state upon the relation of a nonresident property owner who paid taxes in the amount of one dollar a year. Otherwise than as above stated, there is no allegation tending to show dissatisfaction with the legislation prior to September, 1897, when the brick company defendant entered upon the work which led to the assessment in dispute in this suit. During these years the city authorities have, as the bill alleges, performed all the functions of government in the territory, and taxes have imposed and collected (presumably from complainants among others), improvements commenced and continued, interest on bonds paid, and no action taken by any one to prevent these measures, or to test their validity. What may have been the secret thoughts of the complainants or other citizens during all this time must be matter wholly immaterial, so long as there was such acquiescence on the part of the public authorities as has been stated in the opinion of the court in the *quo warranto* case, and such as substantially appears by the allegations of the bill in this suit. The particular allegations of nonacquiescence by the complainants do not detract from the strength of the principles laid down by the state court, nor do they in any degree affect the full applicability of those principles to the facts set up in the bill in this suit. The action of the state against the city of Des Moines has been the only thing done towards making any attempt to test the question of the validity of the legislation prior to the commencement of this suit. In this suit we are bound to take the law of Iowa as it has been decided to be in

the *quo warranto* case. In that case it has been deliberately decided that the validity of the organization of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by any one at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the constitution and laws of the United States is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the constitution, or of some law of the United States, upon the determination of which the recovery depends. Shreveport *v.* Cole, 129 U. S. 36, 9 Sup. Ct. 210; New Orleans *v.* Benjamin, 153 U. S. 411, 14 Sup. Ct. 905.

Federal Jurisdiction—Pleading.

Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a shadow of a federal question in this suit, for, if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretense that the collection of the assessment would be without due process of law.

Same—Validity of City Government—Void Statute—Estoppel—State Decision Conclusive.

The allegation that the suit arises under the constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the circuit court. That court was therefore right in dismissing the bill, and its decree must be affirmed.

GIBSON

v.

WOOD.

(*Court of Appeals of Kentucky, Feb. 21, 1899.*)

Residents of Annexed Territory—Eligibility to Office—Length of Residence.—Where a city has annexed territory, the length of time a person had resided in such territory, prior to its annexation, is to be given the same effect as a residence for the same period in the city, in determining as to his eligibility to a city office.

APPEAL by plaintiff from Jefferson county circuit court, chancery division. *Affirmed.*

Helm & Bruce, for appellant.

John W. Barr, Jr., and *Humphrey & Davie*, for appellee.

HAZELRIGG, C. J. The opinion of the chancellor so fully covers the law and the facts of this case that we adopt it as our opinion. It is as follows:

"In October, 1893, the plaintiff, Charles H. Gibson, was elected commissioner of the sinking fund of the city of Louisville for a term of three years, and until his successor shall have qualified. The plaintiff entered upon the duties of his office, and became president of said board. On October 15, 1896, the general council of the city of Louisville, duly assembled in joint session for the purpose, elected the defendant, George T. Wood, to succeed the plaintiff, Charles H. Gibson; casting 8 votes for the plaintiff, 3 votes for J. M. McKnight, and 25 votes for the defendant. A proper certificate of election has been delivered to the defendant. He has given bond, and taken the oath of office, as required by law, and his bond has been approved by the general council. This action was begun November 9, 1896, for the purpose of enjoining and restraining the defendant from taking or holding the office of com-

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missioner of the sinking fund of the city of Louisville, or from in any manner interfering with the plaintiff in the discharge of his duties as such commissioner. A temporary restraining order was entered in accordance with the prayer of the petition. The case is now before the court upon an application for a preliminary injunction, as prayed for in the petition.

"It is claimed that defendant, Wood, was not at the time of his election, and is not now, eligible to hold the office of sinking fund commissioner of the city of Louisville by reason of his residence only. Section 261 of the city charter provides: 'No person shall be eligible to any office who is not at the time of his election a qualified voter of the city, and who has not resided therein three years preceding his election.' The evidence shows that the defendant, Wood, was born in the city of Louisville on December 26, 1855; that from his birth until the 10th day of July, 1893, he resided at No. 946 Third street, in the city of Louisville; that on July 10, 1893, he moved, with his family, to his present residence, on the northwest corner of East Broadway and Longest avenue, then in the town of Enterprise, a suburb of the city of Louisville, and about two squares east of the city boundary as fixed in 1869; and that he has continuously lived in his new home since July 10, 1893. In August, 1896, the town of Enterprise was annexed to, and became a part of, the city of Louisville, and is now designated as the Thirty-Fifth precinct of the First ward of said city. At the election held on November 3, 1896, the defendant, Wood, voted at said precinct. It appears that, while defendant had resided in his present home more than three years before his election in October, 1896, the territory upon which his residence is located had been a constituent part of the city of Louisville only about two months at the time of his election.

"In considering the eligibility of the defendant, therefore, are we to give him the benefit of his period of residence from the time he moved to his new home, in August, 1893, when

it was located in the town of Enterprise, or shall he be restricted to the time that his home has been incorporated in the present limits of the city of Louisville? The question may be simply put as follows: When the territory occupied by the defendant's residence was incorporated into the city of Louisville, did he then acquire all the rights of a resident of the city of Louisville, and is he entitled to consider the period of his residence in Enterprise in determining his eligibility to this office? The industry of counsel has failed to produce any authority directly in point. Many instances, more or less analogous, have been used in illustration. The organization of the state of Kentucky is cited as bearing upon this question. Prior to February, 1791, the territory composing the present state of Kentucky was known as the 'District of Kentucky.' The first constitution, adopted in April, 1792, provided that representatives should be chosen on the first Tuesday in May following, and that no person should be eligible to that office who had not been a resident of the state of Kentucky for two years next preceding his election. The same provisions applied to the electors, except the period of their residence was raised to three years before the election. While the district was admitted into the Union as a state in February, 1791, and the election was held in May, 1792, when the state of Kentucky had been in existence as a state less than two years, still persons were considered eligible whose continuous residence in the district and in the state of Kentucky covered the constitutional period of eligibility. Strictly speaking, no person had resided in the state of Kentucky a period of two years, for the state had not existed as a state for that length of time, but people who had lived two years upon the territory which had been erected into the state of Kentucky were deemed eligible as representatives, within the meaning of our first constitution. Likewise, section 114 of the present constitution of Kentucky provides that no person shall be eligible as judge of the court of appeals who has not resided in the district in which he is elected two years next preceding his election. The act creating seven

districts for the several judges of the court of appeals was passed in June, 1893, and Jefferson county was made a separate district, known as the 'Fourth Appellate District.' It was further provided that the judge of the Fourth appellate district should be elected in 1894. If we apply the strict letter of the law, which requires a residence of two years in his district, then no one in this district was eligible for the office of judge of the court of appeals, for the district was not two years old. No one, however, has for a moment questioned the correctness of the practical construction given in that instance. Again, the federal constitution provides that no person, except a natural-born citizen or a citizen of the United States at the time of the adoption of the constitution, should be eligible to the office of president. Texas was admitted into the Union in 1845. Can it be claimed that a person born in the republic of Texas prior to its admission into the Union is ineligible to the presidency of the United States for that reason? We do not believe such a construction can be reasonably contended for.

"An interesting case arose in Ohio. In 1867 the state of Ohio ceded to the federal government a tract of land in Montgomery county, Ohio, to be used as a soldiers' home. As was usual in such cases, the state relinquished all jurisdiction and control over said tract of land, reserving only the right to serve process, in order that the home might not become an asylum for evildoers. The federal government built its soldiers' home, and continued its jurisdiction thereof for about four years, during which time this territory was as distinct from the state of Ohio as the District of Columbia is distinct from the state of Maryland. At the October election in 1869, certain inmates of this soldiers' home voted for candidates for clerk of the court of common pleas of Montgomery county. In the contested election case of Sinks *v.* Reese, 19 Ohio St. 306, it was held by the supreme court of Ohio that these inmates of the soldiers' home were not residents of the state of Ohio, and therefore were not entitled to vote. In the spring of 1871 the federal government ceded the

property back to the state of Ohio, although no affirmative action was ever taken by the state towards accepting the territory so ceded back to it. At the October election of the same year (1871) certain inmates of the home again voted for candidates for the office of coroner of Montgomery county. The prior laws of Ohio required a residence of one year in the state to the election as a prerequisite to the right to vote. In the contested election case of Renner *v.* Bennett, 21 Ohio St. 431, the question was presented as to whether these inmates were entitled to vote at the October election in 1871. The supreme court of Ohio had already decided in the case of Sinks *v.* Reese, *supra*, that from 1867 to the spring of 1871 these inmates of the soldiers' home were not residents of the state of Ohio, and had no right to vote in state elections. When the territory was ceded back to the state of Ohio, in the spring of 1871, these inmates of the soldiers' home immediately became residents of the state of Ohio, but had not been residents for the period of one year prior to the election in 1871. The question was therefore squarely presented whether in considering the eligibility of these inmates of this soldiers' home to the right to vote in the state election, the court should take into consideration the time they had resided in this same spot while it was under the jurisdiction of the federal government, and was not a part of the political government of the state of Ohio. The court held that the time should be counted, and in the course of the opinion used this language, *viz.*: 'These 105 inmates of the asylum were therefore residents and citizens of Ohio at the time of the election. Were they residents of the "state" for the full year, within the meaning of the constitution of Ohio? We think they were. In one sense, the state is a territory; in another sense, it is a political organization. These inmates have resided for the whole year in the same place. Territorially, they, and the asylum in which they reside, have been all the time in the state. Politically, or, if I may so speak, jurisdictionally, both have been temporarily out of the state. The expression is used in both senses. It is used in a territorial

sense in the agreed statement filed in the case. In favor of the right of suffrage, we think it safe and proper to give it that meaning in the constitution. In the primary and popular sense, the asylum is, and always has been, in Ohio. It has never ceased to be a part of the state of Ohio geographically, although the state jurisdiction over it has been temporarily suspended. Suppose a township or a part of a township of one county temporarily attached to another county and reattached to the first; would the legal voters after each change have to begin *de novo* their 20 days' residence in the township and their 30 days' residence in the county? I think not. And yet the cases are supposed to be identical in principle with the one at hand. Both rest on the same provision of the constitution, requiring a prescribed length of residence in the state, county, and township. If there is any difference between the principle involved in the two cases, it is in this: that while in the cases supposed the change of jurisdiction is in fact temporary, in the present case it was necessarily temporary; the jurisdiction having been granted for a temporary purpose, the reversion always remaining in the state. It seems to us it is sufficient that the voter, at the time of the election, has a "residence," in the political and jurisdictional sense of the term, within the proper political division, and has resided in the same place for the prescribed length of time, to fulfill this requirement of the constitution. In such a case it is true, in the primary sense of the words, that there is no change of residence, but merely a change of jurisdiction. To say that there is a change of residence is to give the words a secondary meaning.'

"In the case at bar the defendant, Wood, has done no act by which he should lose any of his political rights, either as a resident of the town of Enterprise or as a resident of the city of Louisville. The city of Louisville has seen fit to incorporate the town of Enterprise, and make it a part of the city of Louisville. In my opinion, when the city of Louisville annexed the town of Enterprise, it adopted the conditions then existing in the town of Enterprise, as to residence and

citizenship, as a part of the city government, and former citizens of the town of Enterprise, who thus became citizens of the city of Louisville, were entitled to all their rights, as former citizens of Enterprise, in determining their eligibility to office in the city of Louisville. When the defendant and his territory became parts of the city of Louisville, they are entitled to all the benefits that belong to all the other property and citizens of the city of Louisville. To hold otherwise would be to bring persons into the city of Louisville, and to burden them with city taxation and all the burdens of our city government, without granting them all the privileges which it had granted to its other residents. It would put the burdens on all residents alike, but would give different rights to different classes of citizens, by distinguishing the old resident from the annexed resident. It follows that the defendant was eligible to the office to which he was elected, and the temporary injunction must be denied.

"SHACKELFORD MILLER,
"Special Judge."

It follows that the plaintiff's petition did not state a cause of action, and, a demurrer thereto having been sustained, the same was dismissed. The judgment is affirmed.

BRUNSWICK GASLIGHT CO.

v.

BRUNSWICK VILLAGE CORP.

(*Supreme Judicial Court of Maine, Feb. 20, 1899.*)

Village Corporations—Construction of Sewers—Liability for Trespass.—Under the provisions of section 2 of chapter 172 of the Private and Special Laws of 1887, incorporating the Brunswick village corporation, that corporation is responsible for acts of trespass or tort committed in the construction of a sewer only when a town would be responsible under the same circumstances.

Brunswick Gaslight Co. *v.* Brunswick Village Corp

Incorporated Towns—Same—Torts of Officers—Liability.— The construction of sewers is not within the scope of the corporate authority of a town. The municipal officers are the only tribunal authorized to construct sewers at the expense of a town. For the torts of this tribunal the town is not responsible.

Torts of Officers—Ultra Vires—Liability.*—A town is not liable for the torts of its own servants, agents, and contractors while engaged in work beyond the scope of corporate municipal authority, even if directed by vote of the town.

Construction of Sewers—Disturbing Gas Pipes—Liability of Village.—*Held*, that the Brunswick village corporation is not liable to the Brunswick Gaslight Company for disturbing the gas pipes of that company while constructing sewers in the streets of Brunswick. And this is so whether the sewer was constructed by direction of its assessors acting in the name of the corporation, or whether it was constructed under the authority of a vote of the corporation itself, and by virtue of a contract with the corporation.

(Official.)

EXCEPTIONS by plaintiff from Cumberland county supreme judicial court. *Overruled.*

Argued before PETERS, C. J., and EMERY, HASKELL, WHITEHOUSE, and SAVAGE, JJ.

Geo. E. Hughes, for plaintiff.
Barrett Potter, for defendant.

SAVAGE, J. This is an action of trespass, in which the plaintiff claims that its pipes, lawfully in the streets of Brunswick village, were broken by the defendant in the course of the construction of sewers. The sewers were constructed by one John H. Flanagan under a contract in writing, which is made a part of the case. The excavations in the streets for sewers were made by license of the municipal officers of Brunswick, and of the assessors of the defendant corporation. The contract with Flanagan appears to have been made in the name of the defendant; but by what authority it was made does not appear. The case was submitted to the presiding justice upon

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*See Hoggard *et ux. v.* Mayor, etc., of Monroe, 1 Mun. Corp. Cas. 660, and *note*, p. 665.

an agreed statement of facts. He ruled that the action was not maintainable, and the plaintiff took exceptions.

1. The act incorporating the defendant (Priv. & Sp. Laws 1887, c. 172) contains, in section 2, the following provisions: "Said corporation within its territorial limits shall have all the rights, powers and privileges which towns have under the first sixteen sections of chapter sixteen of the Revised Statutes, and shall be subject to all the obligations, responsibilities and penalties which the same sections impose upon towns. All powers and privileges granted by the same sections to the municipal officers of towns are hereby granted to the assessors of said corporation." The sections of the Revised Statutes referred to are those which prescribe and limit the duties and responsibilities of towns, and the powers and privileges of municipal officers with respect to the construction and maintenance of sewers.

Village Corporations—Construction of Sewers—Liability for Trespass.

If it be assumed that the sewers in question were constructed by direction of the defendant's assessors alone, as they might have been under the foregoing provisions of its charter, it is clear that the defendant is liable for acts of trespass or tort committed in the process of construction only when a town would be responsible under like circumstances.

Under section 2 of its charter, the defendant has the same authority that a town has,—no more. Its assessors are vested with all the powers of municipal officers in this respect. And the same principles must apply in the case of this village corporation as apply in the case of a town.

The powers and responsibilities of towns in the construction and maintenance of sewers were fully examined and stated by this court in Bulger *v.* Inhabitants of Eden, 82 Me. 352, 19 Atl. 829, and more recently in Gilpatrick *v.* City of Biddeford, 86 Me. 534, 30 Atl. 99. The statute imposes no duty upon a town, as such, to build sewers. The construction of sewers is not within the corporate authority of a town. The municipal officers are the only tribunal authorized to con-

Incorporated Towns—Same—Torts of Officers—Liability.

struct sewers at the expense of a town. Darling *v.* Bangor, 68 Me. 106; Bulger *v.* Eden, *supra*. For the torts of this tribunal the town is not responsible. Bulger *v.* Eden, *supra*. It follows that, if the sewers in this case were constructed by authority of the assessors alone, the defendant is not liable for the torts complained of.

Torts of Officers—Ultra Vires—Liability.

2. But it is provided in section 3 of the defendant's charter that the corporation may "authorize its assessors or its special committee to contract in its behalf for any of the purposes aforesaid." The "purposes" referred to are those specified in the preceding section of the charter, from which we have already quoted, relating to sewers. It would seem that the defendant was by section 3 granted corporate authority to construct sewers. Although this latter section was not alluded to by counsel in argument, still we think it should be considered, for the case does not show explicitly under the provisions of which section the sewers were built. Now, if we assume that these sewers were constructed by the defendant by virtue of its corporate authority, will the plaintiff be placed in a better position? We think not.

The plaintiff, by its charter (Priv. & Sp. Laws 1854, c. 291), obtained "the right to lay gas pipes in any of the public streets and highways of the town of Brunswick, the consent of the selectmen of said town having first therefor been obtained." But this was not an absolute right. It was only a qualified right. It was not paramount, but subordinate. The placing of its pipes in the streets, with the consent of the selectmen, did not give the plaintiff the vested right to have them remain as placed, undisturbed. Its right was subordinate to the rights of the public in the use of the streets; and it was subject to the power of the legislature to authorize additional public uses of the streets, and that, without providing for the payment of compensation for incidental and consequential damages occasioned by such uses. Notwithstanding the provisions in the plaintiff's

Construction of Sewers—Disturbing Gas Pipes—Liability of Village.

charter, we think it cannot be successfully claimed that the legislature did not still possess the power to authorize the construction of sewers in the streets, although by such construction the plaintiff might be put to inconvenience, damage and loss.

These doctrines are sustained by a general concurrence of authority. Gaslight Co. *v.* Shanahan, 65 N. H. 233, 19 Atl. 1002; Railroad Co. *v.* Wakefield, 103 Mass. 261; *In re* Deering, 93 N. Y. 361; National Waterworks Co. of New York *v.* City of Kansas, 28 Fed. 921; Rockland Water Co. *v.* City of Rockland, 83 Me. 267, 22 Atl. 166; Belfast Water Co. *v.* City of Belfast, 92 Me. 52, 42 Atl. 235; Elliott, Roads & S. 368. The legislature exercised its power by granting the defendant's charter. The defendant, then, clearly had the right to construct sewers in its streets. If it did so reasonably and properly, it was only in the lawful exercise of its right. It is well settled that when a public corporation does only what by its charter it is authorized to do, and is free from fault or negligence, it is not liable for consequential damages. Darling *v.* Bangor, *supra*; Sumner *v.* Dam Co., 71 Me. 106; Rogers *v.* Railroad Co., 35 Me. 319. We think this rule is applicable here.

Now, what are the facts? The claim of the plaintiff, as set forth in the agreed statement of facts, is simply this: "That its pipes, lawfully in the Brunswick streets, were broken by the defendant in the course of the construction of sewers in said streets." This is the whole of it. It is not claimed that the acts of the defendant were negligent, unreasonable, unnecessary, or in excess of its statutory rights; and, of course, we cannot assume them to have been so. The question is squarely presented whether the defendant, having constructed its sewers in a reasonable and proper manner, can be held responsible for damages which were the natural or necessary result of the exercise of its lawful powers. We think the question must be answered in the negative.

As these conclusions necessarily dispose of the case, it is unnecessary to consider the other questions discussed by counsel. Exceptions overruled.

McCRAY

v.

TOWN OF FAIRMONT.

(*Supreme Court of Appeals of West Virginia.*)

Change of Grade Causing Damage by Surface Water—Liability of Municipality.*—A municipal corporation is not liable for damages to a lot by reason of change of a street's grade operating upon surface water, though it may increase it; but if the work operates, as its direct effect, to collect and cast water in a mass on the lot, the corporation is liable.

Same—Same—Pleading.—A declaration against a municipal corporation for damages from flowage of water upon a lot from a change of grade of a street must allege that by the work water was collected and cast in a mass upon a lot.

Measure of Damages.—In an action against a municipal corporation for damage to a lot from change of grade of a street, the measure of damages is the difference between the market value of the lot immediately before and immediately after the change.

Instructions.—The practice of asking several instructions, expressive of the same law, condemned.

(Syllabus by the Court.)

ERROR by defendant to Marion county circuit court. *Reversed.*

W. S. Haymond, *W. S. Meredith*, and *E. F. Hartley*, for plaintiff in error.

B. B. Dovener and *U. N. Arnett, Jr.*, for defendant in error.

Case Stated.

BRANNON, J. Charles E. McCray brought an action on the case in the circuit court of Marion county against the town of Fairmont to recover damages to buildings on a lot resulting from a change of grade in a street, in which there was a verdict for $800, and judgment, and the town has brought the case here.

*See *notes*, 1 Mun. Corp. Cas. 66 and 73.

The first point is a demurrer to the declaration, which was overruled. The cases of Jordan *v.* City of Benwood, 42 W. Va. 312, 26 S. E. 266, Yeager *v.* Town of Fairmont, 43 W. Va. 259, 27 S. E. 234, and Clay *v.* City of St. Albans, 43 W. Va. 540, 27 S. E. 368, hold that flow of surface water upon property, though it injure it, caused by change of grade of a street, will not render a municipal corporation liable to damages, but if the corporation thereby collects a body of water, so that it ceases to be a mere drainage of surface water, and casts it in a mass upon a lot, it is liable. Therefore a declaration must allege that the corporation did thereby collect and cast water in a mass upon the lot, because, unless such is the case, there is no liability. This declaration does not do so, and I think that those cases, notably the Yeager Case, would sustain the demurrer. The declaration only alleges that, by reason of the change of grade, "the drainage of water upon said plaintiff's lot, the foundation and wall of said houses have become dampened and weakened," so as to injure, etc. A certain kind of drainage is actionable, another kind not, and the declaration must state the kind that is actionable. This does not. In fact, the word "drainage" is used, which rather imports surface drainage, unless accompanied by averment telling what kind.

Change of Grade Causing Damage by Surface Water—Liability of Municipality.

Same—Same—Pleading.

The second assignment of error is that the court refused to exclude all evidence of McCray tending to show damage from change of grade of any other street than Madison, or of any part of Madison street, except that part only in front of this house, as the declaration only assigned the change in grade of that street as the source of injury, and only the change in that street in front of this lot. Clearly, there could not be given evidence to show change of grade elsewhere than in front of this lot as the source and cause of injury, because the declaration imputes the damage to that alone, and gives no notice of any other change; but, if I

understand it, this evidence only went to show that water flowed from other streets, and other parts of Madison street, collected at the corner of this lot, and gathered and stood in front of it, overflowed the pavement and lot, and invaded the cellar, and dampened the walls, and left mud on the premises. So understanding it, I do not think the evidence objectionable. The same may be said as to the third assignment of error. The fourth assignment, the giving of plaintiff's instruction No. 5, is not discussed by counsel.

Measure of Damages.

As to refusal of defendant's instructions: No. 5 says that, in estimating damages from change of grade, "as complained of in plaintiff's declaration," the jury should not consider any evidence to show that the property was damaged by flow of water. This instruction strikes at the foundation of the action. It is predicated on the theory that the declaration states, as to the water, no cause of action, and for the reason that it does not charge the collection and casting on the lot a mass of water, as stated above in passing on the demurrer, the instruction ought to have been given. The refused instruction 8 is that, unless the jury found from a preponderance of the evidence that the market value of the property was more immediately before the improvement than immediately after, the verdict must be for the defendant. Instruction 9 was just the same in legal effect, and there would be no error in giving one, and not the other. They both state the law correctly, under Board of Education *v.* Kanawha & M. R. Co., 44 W. Va. 71, 29 S. E. 503, and Blair *v.* City of Charleston, 43 W. Va. 62, 26 S. E. 341, and prior cases, and it would be error to refuse one of them, if instructions 1 and 3, expressive of the same legal proposition, had not been given. Why incumber the record with so many instructions expressive of the same law, imposing unnecessary labor on the courts, and, worse than all, confusing a jury? JUDGE DENT animadverted upon this practice in Plate *v.* Durst, 42 W. Va. 69, 24 S. E. 580. See Shrewsbury *v.* Tufts, 41 W. Va. 213, 23 S. E. 692. The

assignment of error that the damages are excessive I will not discuss, but leave the evidence for another trial, for reasons which are stated in an opinion filed by me in State *v.* Hul[redacted], 32 S. E. 245, 45 W. Va. —. Reversed, verdict set aside, and new trial.

ARTHUR

v.

CITY OF CHARLESTON.

(*Supreme Court of Appeals of West Virginia, March 25, 1899.*)

Personal Injuries—Rope across Sidewalk—Negligence—Question for Jury.*—In an action of trespass on the case against a city to recover damages for an injury claimed to have been sustained by tripping and falling over a rope stretched across one of its sidewalks, in which the testimony of the plaintiff shows that he was ignorant of the existence of such obstruction, and that, although there were electric lights in the immediate neighborhood of the rope, yet the shadow of the telegraph pole to which it was tied obscured the rope, the question of negligence on the part of the defendant was one for the jury.

Same—Same.—Where a party is injured by an obstruction on a sidewalk in a town, the question as to whether said town has been negligent in allowing such obstruction to be and remain on the sidewalk depends upon the circumstances of the particular case.

(Syllabus by the Court.)

ERROR by plaintiff to Kanawha county circuit court. *Reversed.*

E. W. Wilson, for plaintiff in error.

C. B. Couch, for defendant in error.

ENGLISH, J. An action of trespass on the case was

*As to Liability of City for Defective Streets, see *note*, 1 Mun. Corp. Cas. 58.

Arthur *v.* City of Charleston

brought on the 28th of July, 1897, by R. H. Arthur against the city of Charleston, in which he claimed $10,000 damages for injuries alleged to have been received by him, and occasioned by the failure on the part of said defendant to keep one of its sidewalks free from obstruction and safe for travel, in this: that it negligently permitted the said sidewalk to become and remain obstructed by a strong, heavy rope or cable fastened on the opposite side of said walk, and tightly drawn across, and a short distance above, the same, which caused him, in passing along said sidewalk, to be thereby tripped, and to fall upon the sidewalk, greatly injuring himself. A demurrer was interposed by the defendant to the plaintiff's declaration, which was overruled. The defendant pleaded the general issue, and on the 11th day of November, 1897, the cause was submitted to a jury, who heard the plaintiff's evidence; and, he having rested his case, the defendant, by its attorney, moved the court to exclude the evidence of the plaintiff from the consideration of the jury, which motion prevailed, and the jury was instructed to disregard the plaintiff's evidence, and thereupon the jury found the defendant not guilty. The plaintiff, by his counsel, moved the court to set aside the verdict as contrary to the law and the evidence, and award him a new trial, which motion was overruled, and the plaintiff excepted, and judgment was rendered for the defendant. Thereupon the plaintiff, by his counsel, moved the court to set aside said judgment, which motion was overruled, and the plaintiff, by counsel, excepted, and took a bill of exceptions, setting out the testimony, and applied for and obtained this writ of error. The only error assigned by the plaintiff claims that the court erred in striking out the evidence, and directing the jury to find a verdict in favor of the defendant.

Case Stated.

The question presented for our consideration by this record is whether the circuit court erred in striking out the plaintiff's evidence, and directing the jury to find a ver-

Personal Injuries —Rope across Sidewalk—Negligence—Question for Jury.

dict for the defendant. The testimony adduced does not tend in any manner to indicate that there was any inherent defect in the pavement at the point where the plaintiff was injured, and we cannot say, from the testimony, that the sidewalk was out of repair; but it is shown that there was an obstruction in the shape of a rope, the same being the stern line of the wharf boat; that the river was high, and the line was made fast to a telegraph pole on the top of the bank. Now, in order that the plaintiff should succeed in this case, it was not only necessary that he should convict the defendant of negligence, but if, in putting in his evidence, he also showed that he was guilty of contributory negligence, he could not recover. Both of these questions involved, to some extent, questions of fact. Elliott, in his valuable work on Roads and Streets (page 640), says: "The place where the injury occurred is sometimes an important matter for consideration. Especially is it so upon the question of notice, for what would be negligence respecting a street in a densely-populated and much-frequented part of a city or incorporated town might not be so in a remote and little-used street or alley;" citing Reed *v.* Mayor, etc., 31 Hun, 311, which was an action brought to recover damages by one injured by falling on a sidewalk covered with snow, and it was held that "the court should have instructed the jury that what was a reasonable time to remove the snow, and what is a reasonably safe condition of the sidewalk, is for the jury to determine, and must be determined from a reasonable standpoint." On the same page from which the above is taken, Elliott adds: "In most cases the question of whether the corporation ought to have acquired knowledge is dependent upon the locality and its surroundings, and is generally a question of fact for the jury." On the same page he also says: "The weight of authority is overwhelming in favor of the doctrine that contributory negligence will effectually defeat recovery. It is therefore

competent in all cases for the corporation to introduce evidence tending to show that the fault of the plaintiff proximately contributed to his injury." The testimony in this case clearly indicates that the circumstances immediately surrounding and connected with the accident were thoroughly examined and inquired into. The condition of the lights at the point where the injury occurred was investigated, which was proper in order to determine whether beacon lights were necessary, or the street was so well lighted as to charge the plaintiff with negligence in not seeing and avoiding the obstruction. In the case of Chapman *v.* Milton, 31 W. Va. 384, 7 S. E. 22, it was held that our statute (Code, c. 43, § 53) imposes an absolute liability upon cities, villages, and towns for injuries sustained by reason of the failure of the municipal authorities to keep in repair those streets, sidewalks, etc., within the corporate limits which its authorities have opened or controlled, and treated as public streets, sidewalks, etc.; and therefore, in an action against a town by a person injured by a defective sidewalk, he is not required to allege in his declaration, or prove on the trial, that the defendant had notice of defects or want of repair in such sidewalk. There seems, however, to be a distinction between a defect in the sidewalk itself and an obstruction across it, as in this case. In many instances obstructions are placed on the sidewalk as a matter of necessity; for instance, where buildings are in course of construction, or in case of fires or floods, or where merchants are receiving and discharging goods, etc., in all which cases the liability of the town is dependent upon the circumstances, and whether the authorities have been negligent by failing to act with sufficient promptness in removing the obstruction. So, in the case we are considering, the question whether it was the duty of the city of Charleston to know that this line was stretched across the sidewalk, and that the same was dangerous to pedestrians, and if the light at that point was insufficient, or the shadow of the telegraph pole fell in such a manner as to obscure the

rope, and make beacon lights necessary to warn people passing that way of the danger, all bear upon, and are necessary facts to be ascertained and determined in reaching a proper solution of, the issue raised in this case, and in determining whether the defendant was guilty of negligence, or the plaintiff guilty of contributory negligence, as also were the facts disclosed by the physicians as to the character of the plaintiff's injury, and whether it resulted exclusively from falling over this rope, or was a consequence of the old wound he had received, of which the physicians testify.

Counsel for the city claims that the plaintiff, in putting in his case, showed that he was guilty of contributory negligence. When we look for the definition of this, we find in Beach's valuable work on that subject the following: "Contributory negligence, in its legal signification, is such an act of omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. To constitute contributory negligence, there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury."

My conclusion is that the issue made by the pleadings in this cause presents so many questions of fact that the court erred in striking out the plaintiff's evidence, and taking the question of negligence, which was dependent upon so many facts, from the jury. The judgment complained of is reversed, the verdict set aside, and a new trial awarded.

Same—Same.

ROBERTS

v.

VILLAGE OF ST. JAMES.

(*Supreme Court of Minnesota, June 9, 1899.*)

Personal Injuries—Notice of Claim.*—It is a sufficient service of the notice required by Laws 1897, c. 248, to be given to the common council or other governing body of a municipality as a condition precedent to the bringing of an action against it for injuries sustained by its negligence, if the notice is directed to such council, and delivered, for filing, to the recorder or other officer having the custody of the records and files of the council, within the time limited by the statute.

(Syllabus by the Court.)

APPEAL by defendant from Watonwan county district court. *Affirmed.*

W. S. Hammond and *Lorin Cray*, for appellant.

Seager & Lobben, *Ashley Coffman*, and *A. R. Pfau*, for respondent.

START, C. J. Action for the recovery of damages sustained by the plaintiff by reason of a defective sidewalk. Verdict for the plaintiff, and the defendant appealed from an order denying its motion for a new trial.

The defendant's sole contention here is that the plaintiff did not give notice of her injury and present her claim for compensation to the village council, as required by Laws 1897, c. 248. Within 30 days after her injury, the plaintiff signed and verified a written notice of her injury and claim for compensation therefor, which was directed to the village council, and in form and substance complied with the statute. Her attorney acting for her, and while the village

*See Seamons *et ux. v.* Fitts, Town Treasurer (R. I.), 1 Mun. Corp. Cas. 465 and *note*, p. 478.

council were in actual session, handed to and left with each member thereof, and with the recorder of the village a copy of such notice. Thereupon the council resolved to refer the same to the attorney of the village. On the next day the plaintiff's attorney handed to and left with the president of the council the original notice, who sent it to the recorder, who filed it in his office. All this was done within the time limited by the statute. How the notice of injury must be given and claim for compensation presented to the council or other governing body of the municipality the statute does not direct. It must be done in some practical and effective way, and in determining the sufficiency of the method adopted in any particular case technical strictness will not be required; a substantial compliance with the statute is all that is necessary. In the cases of Doyle *v.* City of Duluth (Minn.) 76 N. W. 1029, and Lyons *v.* City of Red Wing (Minn.) 78 N. W. 868, we indicated some of the orderly methods for giving the notice of the injury and presenting the claim for compensation to the council. The method suggested for serving the notice when the council was not in session was to direct the notice to the council, and leave it with the clerk or other officer who had charge of the record and files of the council, with a request annexed that it be laid before the council at its next meeting; but the court did not hold that the suggested method was the exclusive one. In the case under consideration the notice was filed with the recorder within the required time. The fact that it passed through the hands of the president of the council before it reached the recorder is not material. The omission to annex to the notice a request that it be laid before the council was not fatal, for the notice was directed to the council, and it was the duty of the recorder to lay it before that body at its next meeting, whether requested to do so or not. If it were necessary to give notice of the injury, and present the claim for compensation therefor to the council at a meeting thereof, all that it would be necessary for the council to do to prevent he injured party from ever bringing an action to recover

compensation for his injuries would be to refrain from meeting for 30 days after the injury occurred. Whether the attempted service of the notice in this case upon the council when it was in session was valid it is unnecessary to determine, for we hold that the notice of the injury was given and claim for compensation therefor presented to the council, as required by the statute, by filing the original notice, directed to the council, with the recorder. Order affirmed.

BUCK, J., took no part.

ZIEGLER

v.

CITY OF WEST BEND.

(*Supreme Court of Wisconsin, Jan. 31, 1899.*)

Action for Negligence—Statutory Requirements.*—The complaint in an action against a city for personal injuries, which alleges that the injuries resulted from defendant's failure to repair or properly repair a street so that plaintiff fell into a manhole, owing to its cover sliding out of place when he stepped upon it, must, to state a cause of action, also allege that defendant was given the notice required by statute within 15 days after the occurrence of the injury, such action being for negligence and not for the creation of a nuisance.

APPEAL by defendant from Washington county circuit court. *Reversed.*

The complaint, by appropriate allegations, states that plaintiff was injured without fault on his part, by falling into the manhole of a catch-basin located in one of the streets of the defendant city; that the cover of the manhole was so improperly adjusted that travel over it by persons, either in vehicles or otherwise, was liable to displace it with injurious consequences to such persons; that plaintiff was injured in

*See *note*, 1 Mun. Corp. Cas. 478.

that way; that while traveling over the manhole he stepped upon the cover, causing it to slide out of its bed and let him drop into the manhole, thereby seriously injuring him. The complaint contained no allegation of notice to the city of the injury, with time and place of its occurrence and a description of the insufficiency or want of repair of the street causing it, except of a notice served some two months after the injury. The defendant demurred to the complaint for want of facts stated therein sufficient to constitute a cause of action. The demurrer was overruled, and defendant appealed.

P. O'Meara and *H. K. Butterfield*, for appellant.
Barney & Kuechenmeister, for respondent.

MARSHALL, J. (after stating the facts). This is an action to recover damages for injuries alleged to have been sustained by the plaintiff because of failure by the defendant city to perform its statutory duty of making the city street, where the injury occurred reasonably safe for public travel. There is no common-law liability in such a case, and none under the statute except upon compliance with all the conditions prescribed therein. This court has often said that, the right being statutory, it is competent to attach such conditions to it as in legislative wisdom may be deemed proper. However burdensome such conditions may be, the claimant for compensation for injuries has no good reason to complain, for without the statute he would be entirely remediless. In Daniels *v.* City of Racine, 98 Wis. 649, 74 N. W. 553, the subject will be found fully discussed.

Section 1339, Rev. St. 1898, provides that no action shall be maintained to recover damages caused by the insufficiency or want of repair of a street in any city, unless, within 15 days after the occurrence of the event causing the injury, a notice in writing, signed by the party, his agent or attorney, shall be given to the mayor or city clerk of the city against which the damages are claimed, stating the place where and time when the injury occurred, and describing generally the insufficiency or want of repair which occasioned it, and

that satisfaction therefor is claimed of such city. The complaint in this action shows that notice of plaintiff's claim was not given to the city till long after the expiration of the statutory period, hence it fails to state a cause of action. The point involved has often been discussed by this court, and very recently in Daniels *v.* City of Racine, *supra*.

Counsel for respondent contend that the statutory requirement for a notice referred to, does not apply to injuries caused by defects in the original construction of a street, and cite cases in this court where it has been held that a municipality is responsible the same as a private individual for an improper obstruction placed in a street, constituting a nuisance. Hughes *v.* Fond du Lac, 73 Wis. 380, 41 N. W. 407, is referred to, where a roller was left in the street; also Little *v.* City of Madison, 42 Wis. 643, where the city licensed a street exhibition of wild animals. That rule applies only to the doing of something which the city has no right to do, rendering a street or highway dangerous for public travel, not a failure to do properly what a city has a right to do. It may lay out and open a street for public travel and place in the street those things which legitimately belong there, such as cross walks, sewers and catch-basins with manholes. The failure to render the street as so constructed reasonably safe for public travel is not the creation of a nuisance, but a failure of duty, rendering the city liable to persons injured by the insufficiency, under section 1339 of the statutes. The act of a municipality, resulting in the creation of a nuisance, and the failure to make a street reasonably fit for public travel, or to keep it in a proper state of repair after the original construction, are sufficiently distinct that no great difficulty, it would seem, need be experienced in distinguishing when a claim for damages falls under section 1339 and when not. In the one case the street is obstructed or made unsafe by some act of the municipality of commission or omission, not connected with its construction or repair; in the other, the insufficiency grows out of the unsafe construction of the street or the insufficient repair of it. Stephani *v.* City of

Manitowoc, 89 Wis. 467, 62 N. W. 176, is confidently referred to by respondent. Possibly the learned trial court was misled as to what is there decided. The defect complained of related to the original preparation of the street for public travel in that it was alleged there were no proper safeguards provided to prevent people from walking into an open draw-bridge. The court said, previous notice of the defect was not requisite to charge the city with damages to a person injured thereby. That remark was not made with reference to notice of the injury under section 1339, but notice of the existence of the defect itself prior to the injury. It was the statement of a familiar principle of law that, while notice, actual or constructive, of want of repair of a street, must be brought home to a public corporation in order to charge it with damages for an injury caused thereby, no such notice is required where the defect is in the original construction. In the latter case, knowledge on the part of the city is conclusively presumed. Boltz *v.* Town of Sullivan (Wis.; decided Jan. 10, 1899) 77 N. W. 870, 1 Mun. Corp. Cas. 203. Notice of the injury, with the time and place of it, with a description of the insufficiency or want of repair of a street, comes after the injury occurs, and to enable the officers of the municipality to investigate the occurrence while it is fresh. Notice of the defect in a street, charging the municipality with actionable negligence, when required at all, comes before the injury a sufficient length of time to enable the proper officers, by the exercise of reasonable diligence, to remedy the insufficiency. It must appear clearly, without further discussion of the matter, that the learned circuit judge and counsel for respondent misapprehended Stephani *v.* City of Manitowoc. It has no application to this case whatever.

The order appealed from is reversed and the cause remanded with directions to sustain the demurrer to the complaint.

BARDEEN, J., took no part.

STATE *ex rel.* CITY OF BRIDGETON

v.

BRIDGETON & M. TRACTION CO.

(*Supreme Court of New Jersey, June 21, 1899.*)

Street Railway Company—Duty to Operate Road.—A street-railway company incorporated under the laws of this state, and the route of its road, and the location of its tracks, established by an ordinance of the municipality in the streets of which the company is to operate its road, such ordinance being accepted by such company, and its tracks laid in accordance therewith, and the road constructed and in operation, cannot, at its mere will and discretion, cease and abandon the operation thereof, or any portion thereof. It becomes the duty of the railway company, in the exercise of its rights, privileges and franchises, for the benefit of the public to maintain and operate its road according to the terms of the ordinance, and in compliance with statutes which confer upon the company such rights, privileges, and franchises.

Same—Same.—An implied condition attaches itself to the grant of the franchise that it be held for public benefit, and the duty upon the railway company is to exercise it for such purpose, and, as a public agent, it cannot escape this duty.

Same—Same—Successor Company.—The company, duly incorporated, which has the ownership of, and is in possession and control of, such street railway, its appliances and property, whether under a lease of or by sale from the original or other company incorporated to construct and operate such railway, or by sale under a decree of the court of chancery of this state upon foreclosure under the statute of the state concerning the sale of the property and franchises of certain corporations (P. L. 1897, p. 229, c. 127), has conferred upon it all the corporate rights, liberties, privileges, and franchises of such original or other company, and upon it rests the same burden and duty to maintain and operate such street railway under the statutes and the ordinance of the municipality as was imposed upon the original company.

Same—Same—Non-Performance—Validity of Excuse.—The fact that the located route of the railway is laid across a bridge over a

stream, the construction, maintenance, and control of which bridge is in the board of chosen freeholders, which will not permit the tracks to be laid thereon unless upon proper and reasonable regulations for the safety of the bridge for the traveling public, furnishes no excuse why the road should not be operated upon its route through the streets of the municipality lying upon either side of such bridge. The acceptance of the ordinance being apart from the control of such bridge by the board of chosen freeholders, and having no relation to it, or to its use, and there being an agreement between the railway company and the chosen freeholders in relation to the use of such bridge, the court will not enter upon the consideration of the reasons why the company has not performed such agreement, in order to excuse the company from the performance of its duty towards the municipality in the operation of its road.

Same—Same—Same—Mandamus.*—*Mandamus* is the proper remedy to compel such street-railway company to perform the duty of maintaining and operating such railway for the benefit of the public. The public duty imposed upon the company is always active, potential, and imperative, and must be executed until lawfully surrendered, suspended, or abandoned by the legally expressed consent of the state, and the performance of this duty can be lawfully enforced by *mandamus*.

Same—Same—Same—Same—Municipality as Relator.—The municipality in the streets of which the railway is located by ordinance is a proper relator in a proceeding by *mandamus* to enforce the duties of the company towards the public.

(Syllabus by the Court.)

ARGUED June term, 1898, before LIPPINCOTT and GUMMERE, JJ.

Thomas W. Trenchard and *Thomas E. French*, for relator.
Walter H. Bacon, for respondent.

Case Stated.

LIPPINCOTT, J. This is a proceeding on a rule to show cause, on the part of the relator, why a writ of *mandamus* should not issue commanding the Bridgeton & Millville Traction Company forthwith to resume and discharge its duty as a common carrier of passengers and the exercise of its franchises by operating and continuing to operate for the transportation of passengers the street railway, with all necessary turnouts and switches,

*See note at end of case.

the tracks of which were located by Ordinance 66 of the city of Bridgeton, the relator, entitled "An ordinance locating the tracks of the railway of the Bridgeton Rapid-Transit Company and authorizing the said company to construct a street railway in certain streets in the city of Bridgeton." The facts are that after the incorporation of the Bridgeton Rapid-Transit Company it presented a petition to the city council of the city of Bridgeton for a grant to locate, construct, operate, and maintain a single-track street railway, with the necessary turnouts, in the streets over the route designated in its articles of incorporation; among other streets, "beginning in Summit avenue, about one hundred and fifty feet from the westerly line of Atlantic street, in the city of Bridgeton, in the county of Cumberland, in the state of New Jersey; thence along Summit avenue to Atlantic street; thence through and along Atlantic street to Broad street; thence through Broad street, and across the bridge over Cohansey creek, through Jefferson street to South Pearl street, through South Pearl street to South avenue, and through South avenue to Pamplylia avenue." On January 31, 1892, after consideration, the city council passed an ordinance locating the tracks in the streets of Bridgeton, including the streets above named, granting the company the right to operate the line in such streets by any mechanical power except steam, regulating the manner of construction in such streets, that the said railway should be completed within nine months from the acceptance of the ordinance by the company, and providing for the manner in which the streets should be used. In several sections of the ordinance the duties of the company in relation to the use and repair of the streets are defined, certain restrictions imposed, and the rights of the city in the streets expressly reserved. By the twelfth section of the ordinance it is provided, in substance, that if the company shall fail to run or operate its said cars for the space of five consecutive days, then it shall and may be lawful for the said city council of the city of Bridgeton to order the said company to remove its said tracks wherever it has failed to operate its cars, and un-

less the company shall forthwith remove the same, and place such street or highway in good repair and condition to the satisfaction of the city, then the said city should have power to remove the track, repair the street or highway, and to sell the material removed therefrom, and from the proceeds pay the expense of removal and sale, paying the surplus, if any, to the company, and, in case of deficiency, the company to be liable for the same. On March 1, 1893, the Bridgeton Rapid-Transit Company filed an acceptance of the location of its tracks as designated in this ordinance. On the same day it also filed a general acceptance of the ordinance. On June 3, 1893, the Bridgeton Rapid-Transit Company leased to the South Jersey Traction Company, a corporation organized for the same purposes as the Bridgeton Rapid-Transit Company, the street railway of that company as located under the ordinance, or extended in pursuance of lawful authority then existing or which might thereafter exist, together with all "the branches, extensions, sidings, turnout tracks, rights of way, lands, machinery, fixtures, depots, stables, shops, stations, buildings, structures, improvements, appurtenances, and hereditaments of whatever kind and description and wherever situate," and also "all rights, powers, franchises, and privileges," etc., for the term of 999 years. The South Jersey Traction Company on its part agreed to assume all existing contracts relating to the construction and operation of the railway, and agreed to forthwith proceed at its own cost and expense to construct, equip, and thereafter operate and maintain the whole of the railway not already constructed over and along the streets and highways of the city of Bridgeton, as the route is designated in the articles of the association of the said lessor, and as the same has been located by the city council of the city of Bridgeton by the ordinance aforesaid." The agreement of lease also contained other stipulations that the lessee would exercise all the corporate powers conferred, and exercise every right, franchise, and privilege in respect to the use, management, and maintenance of such railway; and also

that during the continuance of this lease the railway should be efficiently operated with a full equipment during the continuance of the lease. On July 1, 1893, the South Jersey Traction Company, to secure its bonds amounting to the sum of $400,000, mortgaged to the Solicitors' Loan & Trust Company 993 shares of stock of the Bridgeton Rapid-Transit Company and 300 shares of the capital stock of the Bridgeton & Millville Traction Company, the railway of the South Jersey Traction Company, with all its structures, cars and appliances, and also all the leasehold estate acquired by lease from the Bridgeton Rapid-Transit Company, to the South Jersey Traction Company, dated the 23d day of June, 1893. At the same time of the lease from the Bridgeton Rapid-Transit Company, to the South Jersey Traction Company, the latter company by lease acquired from the Bridgeton & Millville Turnpike Company the rights, franchises, and property in certain highways in the city of Bridgeton of that Company, which leasehold estate, with all its appurtenances, rights, and franchises, were expressly included in this mortgage. The mortgage was foreclosed in the court of chancery of this state, and by master's deed dated on May 10, 1897, the shares of stock mortgaged, the railways, rights, franchises, station, and equipments of the South Jersey Traction Company were conveyed to one Frank S. Lewis, including the leasehold estate derived from the Bridgeton Rapid-Transit Company and the Bridgeton & Millville Turnpike Company. On May 11, 1897, the certificate of the organization of the Bridgeton & Millville Traction Company as a corporation of this state was filed in the office of the secretary of state, to which corporation Frank S. Lewis immediately conveyed the shares of stock acquired at the foreclosure sale; also all the railways owned by said South Jersey Traction Company, with all cars, shops, stations, etc., and appliances; also all the leasehold estates acquired by the South Jersey Traction Company.

The Bridgeton & Millville Traction Company was organized by virtue of an act entitled "An act concerning the sale

of property and franchises of any corporation created by or under any laws of this state, except steam railroads, canals, turnpike or plank road companies," approved April 16, 1897 (P. L. 1897, p. 229, c. 127). It will be seen that the Bridgeton & Millville Traction Company was duly organized under the statutes of this state, and became the owner and possessor of all the property and franchises of the Bridgeton Rapid-Transit Company, the South Jersey Traction Company, and the Bridgeton & Millville Turnpike Company, for the purposes of the operation of this street railway over the streets in question. By the statute last cited it is provided that: "Whenever the property and franchises of any corporation * * * shall be sold * * * by any decree or decrees of the court of chancery, * * * such sale * * * shall vest in the purchaser or purchasers thereof all the right, title, interest, property, possession, claim and demand, in law and equity, of the parties to the suit * * * in which such decree * * * was * * * made, of, in and to the said property so sold with its appurtenances; and also of, in and to the corporate rights, liberties, privileges and franchises of the said corporation, but subject to all the conditions, limitations, restrictions and penalties of the said corporation of and concerning the same." It appears in the case that the street railway has been constructed over the entire route located in the ordinance, and has been operated by these different companies in the order of their possession respectively. It appears from the facts that in Broad street, and in the route located by the ordinance of the city, there existed a bridge over Cohansey creek. The construction, maintenance, and repair thereof was invested in the board of chosen freeholders of the county of Cumberland; and it will be perceived that the ordinance provides for the location of the tracks of the street railway over this bridge as a part of Broad street as named in the ordinance. When the operation of the street railway commenced, in 1893 or 1894, the cars ran along Broad street to the easterly side of the bridge, and there stopped, and then the operation of

their railway was resumed by cars on the west side of the bridge in Broad street. Later, rails were laid or located on said bridge, and the road was operated and crossed the same on its tracks. In proof it appears that this bridge had become out of repair, or otherwise insufficient to bear the burden of the cars and travel across it by the street railway, and the board of chosen freeholders either erected a new bridge or reconstructed the old one so as to render it of sufficient bearing capacity to accommodate the travel over the same, and upon which new bridge tracks also were laid, and for a time the railway was operated over the bridge on such tracks. The use of this bridge by the railway company was granted to the company by the board of chosen freeholders by virtue of resolutions granting such permission to use the bridge, and containing conditions for its use; and a formal agreement was entered into between the street-railway company and the board of chosen freeholders as to the construction of the tracks across the same, and the manner in which the operation should be conducted, together with regulations as to the location of the motors by which the cars were propelled across the bridge. The facts show that the street-railway company violated the terms of such agreement with the freeholders, whereupon a dispute arose, and, after much contention between the company and the board, by direction of the board the tracks across the bridge were removed, since which time the respondent has abandoned the use of that part of its located route which lies to the east of and over and beyond the bridge over this creek, and has persistently, after demand being made by the city to operate its railway in the streets of its located route lying in that portion of the city of Bridgeton, refused, and still refuses, to operate said portions of said road, or to make any attempt or endeavor whatever to do so. By the act under which these companies are organized, being an act entitled "An act to provide for the incorporation of street railway companies, and to regulate the same," approved April 6, 1886, and the supplements and amendments thereto (Gen. St. 3216), it is provided

"that such articles of association shall not be tendered to the secretary of state nor filed or recorded in his office until an affidavit is made by at least five of the directors mentioned in said articles * * * that it is intended in good faith to construct, maintain and operate the road mentioned in such articles, * * * or has its route designated by the authorities of the municipality." In this case such affidavit was made and recorded along with the certificate of organization in the office of the secretary of state. The city of Bridgeton has a population of over 13,000 inhabitants. The city is divided by Cohansey creek. On the west side is the Third ward of the city. On the east side are the First, Second, and Fourth wards. By the proof it is shown that the part of the route or line of railway in question in this case is almost wholly within the Third ward, and therefore on the west side of this creek; that on this side the city contains a population of about 3,000; and that the end of the located route in that direction is the South Jersey Institute, where several hundred pupils attend school; and that along the located route Atlantic street is built solidly with houses near to or about to the end of the route. The proof also shows that the abandoned portion of the route was patronized to a considerable extent during its operation. The statute places the location of the route of a street railroad in the city council, and the design of the statute, as it appears to me, is that the city shall determine that question which so closely affects public convenience, and it cannot, under any circumstances, be left to the company itself to say what portion of its route shall be operated. The council could not do this, and, if it did, it would be an unwarranted delegation of authority. Theberath *v.* City of Newark, 57 N. J. Law, 309, 30 Atl. 528. It appears by the proof in the case not only was the route of the company located, but the same was operated upon by either one or all of these companies, respectively, according to its period of occupation and ownership; and that since October 6, 1897, there has been a complete failure upon the part of any of these companies to perform their duties.

Upon the respondent in this case the burden and duty of the operation of this road rests. It was assumed by the defendant company under the law in the exercise of its rights, privileges, and franchises for the benefit of the public, and therefore it seems clear that their duty in this respect can be and should be enforced by *mandamus*. The respondent has the franchise, and is under an obligation to perform the duties assumed by the Bridgeton Rapid-Transit Company. Its title to its property and franchises is deduced from the Bridgeton Rapid-Transit Company by the statute and by its own agreements. It owes the same duty in respect to operation of the railway mentioned in the articles of association of the Bridgeton Rapid-Transit Company as the Bridgeton Rapid-Transit Company did originally if it had constructed and operated the railway. State *v.* Paterson, N. & N. Y. R. Co., 43 N. J. Law, 508. It became the duty of the respondent company to operate the railway over its entire route under the franchises as acquired by it. Its exercise of franchise in the operation of its railway upon this street was exclusive, and it was its duty to construct, maintain, and operate a railway on the surface of the street to carry passengers, and demand tolls; and that was in so far exclusive that others could not use the road without the grant of legislature, nor exercise that same or similar franchise upon that street without such grant. Citizens' Coach Co. *v.* Camden Horse R. Co., 33 N. J. Eq. 267-279. In Messenger *v.* Railroad Co., 36 N. J. Law, 407, CHIEF JUSTICE BEASLEY, speaking of the duties of a common carrier in a case involving a contract creating illegal preferences, on page 410, says: "A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all." Again: "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use the railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the

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consideration for them." Again, he says: "It cannot be supposed that it was the legislative intention, when such privileges were given, that they were to be used as private property, at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, *quasi* public agents." The grant being exclusive, they must be held to a good faith in the performance and fulfillment of their duties. I cannot perceive any excuse whatever by which the respondent can be permitted to abandon the operation, or any part of it. That a portion is unprofitable, or that a portion is more difficult to operate, are not valid reasons for abandonment. Its application to the city was for the location of its tracks over the whole route. The terms and conditions of the ordinance, and the ordinance, passed on the faith of the duty of the company to operate its road over the entire route located. In view of this ordinance, it must be conclusively said that, if one part was to be operated and another part might be abandoned at the discretion of the company, the terms and conditions of the ordinance would have been different. This must be conclusively assumed in a case of this character. It appears clear from the statute and the ordinance that it is the duty of such companies organized under the statutes to operate the roads mentioned in its certificate of incorporation for the benefit of the public in consideration that it shall have the franchise of transporting the passengers, and taking the tolls from them, and that it cannot escape the performance of this duty as a public agent.

Same—Same.

It also seems clear to me, as against the argument made to the contrary by counsel of the respondent, that *mandamus* is the only and the proper remedy, and that the city of Bridgeton, representing the public, for whose benefit the ordinance was passed, and the road constructed and operated, is a

proper party as relator. This position seems to be clearly sustained by all of the authorities. Mt. Pleasant Cemetery Co. *v.* Paterson, N. & N. Y. R. Co., 43 N. J. Law, 508, affirmed on the opinion below, 45 N. J. Law, 186; New York & G. L. Ry. Co. *v.* Inhabitants of Township of Montclair, 47 N. J. Eq. 591, 21 Atl. 493; Wilbur *v.* Railway Co., 57 N. J. Law, 212, 31 Atl. 238; Rex *v.* Severn & Wye Ry. Co., 2 Barn. & Ald. 646. In the last case BEST, J., said: "But upon principle and authority I am of opinion that the court ought to grant this *mandamus*. Numerous applications are made to parliament by speculative individuals to form these navigable canals and railways. Great public benefits are held out as inducements to the legislature to sanction these undertakings, and, when their sanction is obtained, is it to be permitted to these persons to say that they will only do what is beneficial to themselves, and disregard entirely the interest of the public?" See Talcott *v.* Pine Grove, 1 Flip. 145, 23 Fed. Cas. 652; *Id.*, 19 Wall. 666. In the case of State *v.* Hartford & N. H. R. Co., 29 Conn. 538–547, which was on a demurrer to a return to an alternative writ of *mandamus*, the court said: "We prefer to place our decision on the simple ground of the corporate duty of the respondents. All jurists and judges will at once agree that charter parties are obliged fairly and fully to carry out the objects for which they were created, and that they can be compelled by *mandamus* to do so, and it will not be questioned that in the case of public highways—whether turnpikes or railroads—they are bound to keep them fit for use, and, in case of railroads, to keep them furnished with suitable cars, engines, and attendants without which they cannot be used at all. We advise the issue of a peremptory *mandamus*." The application for *mandamus* in this latter case was to compel the resumption of traffic over a small part of the road abandoned in accordance with an agreement with another railroad company. In People *v.* New York Cent. & H. R. R. Co., 28 Hun, 543–558, the court said: "The duties imposed must be discharged at any cost. They cannot be laid down, or suspended, or abandoned without the

legally expressed consent of the state. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered; otherwise, a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to *mandamus* or indictment." People *v.* Rome, W. & O. R. Co. (N. Y.) 8 N. E. 369; Chicago, B. & Q. R. Co. *v.* State, 47 Neb. 549, 66 N. W. 624; Indiana *v.* Lake Erie & W. R. Co., 83 Fed. 284; State *v.* Minneapolis & St. L. Ry. Co., 39 Minn. 219, 39 N. W. 153; State *v.* Hannibal & St. J. R. Co., 86 Mo. 13; State *v.* New Orleans N. E. R. Co., 42 La. 11, 7 South. 84; People *v.* Colorado Cent. R. Co., 42 Fed. 638.

The only other pretense of excuse for the abandonment or cessation of the operation of this part of the route of its railway by the respondent was that the board of chosen freeholders removed from the bridge in Broad street over Cohansey creek the rails which were there laid upon which it operated its road over the bridge. It is not shown by the proof in this case that the respondent ever attempted in any way to invoke legal proceedings to compel the board of freeholders to replace such rails, or has ever attempted, from the time they were torn up, to replace them there themselves. It does appear very clearly that a contract existed between the board of chosen freeholders and the respondent by which permission was given by the board for the free and full use of this bridge to locate its tracks over which the cars could be operated, qualified with a few simple, plain, natural, and reasonable conditions for the preservation of the bridge from danger on account of other public travel; and the dispute between the freeholders and the respondent under this contract seems clearly to have arisen over the location of the motor by which the cars were to be operated over the bridge. The facts show under this agreement that the motor was not to be located on top of the bridge, but either at one side or under it, or in some position

where it would not interfere with the public use of the bridge. Upon this point the respondent and the board of chosen freeholders seem to be at opposites, and the board of chosen freeholders—whether rightfully or wrongfully need not be considered—displaced the rails on said bridge in order to prevent the operation of the cars across it. It would appear to be a mere pretense of the respondent. And it may be remarked that the franchise of this company can be fully exercised in behalf of the public without any reference at all to the location of its tracks upon this bridge. It was once so operated, and it can be again, and therefore, even if the action of the board of chosen freeholders was legal, and prevented the operation of the cars across this bridge upon the rails there located, or if they were illegally displaced by the board of freeholders, this would furnish no excuse whatever for the respondent for the failure to exercise and perform its duty to the public as they can be performed, as fully as they ought to be under the ordinances of the city to be performed. But it appears, from the facts, that the rails were removed by the board of freeholders from this bridge through the fault of the respondent in neglecting to keep its contract with the board in respect to the bridge. If the contract had been performed by the respondent company, there could have been no legal interference with the location of their tracks across the bridge by the board of chosen freeholders. The conclusion which the court has reached upon this matter is that this has been made by the respondent a mere excuse for the non-operation of a part of the road which, from one reason or another, it considers itself entitled to abandon. This cannot be made a legal excuse for such abandonment in any sense. The facts do not bear out the excuse even to any reasonable extent. The city of Bridgeton does not, under the facts, as it appears to the court, seem to be in any laches in this matter whatever. The rule to show cause in this case must be made absolute, and the writ of peremptory *mandamus* awarded in accordance with it, with costs.

Note

Mandamus to Street Railroads. — *Mandamus* will lie against a railroad corporation to compel it to perform a clear legal duty to the public. State *ex rel. v.* Jacksonville St. R. Co., 50 Am. & Eng. R. Cas. 179, 29 Fla. 590, 10 So. Rep. 590; State *v.* N. E. R., 9 Rich. 247, 67 Am. Dec. 551; State *v.* McIver, 2 S. C. 25; People *v.* Chicago, etc., R. Co., 130 Ill. 175, 40 Am. & Eng. R. Cas. 352. And to compel it to perform the objects for which its franchise was granted. Railroad Commissioners *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208; State *v.* Hartford, etc., R. Co., 29 Conn. 538. So it has been held that the performance of the duties which a street-railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by *mandamus*. Potwin Place *v.* Topeka R. Co., 56 Am. & Eng. R. Cas. 549, 51 Kan. 609, 33 Pac. Rep. 309, 37 Am. St. Rep. 312. But in San Antonio St. Ry. Co. *v.* State *ex rel.* Elmendorf *et al.* (Tex.), 6 Am. & Eng. R. Cas., N. S., 658, it was held that in the absence of a provision in its charter making it obligatory upon it to construct and operate its line on certain streets, a street-railway company, which has constructed and is operating its line in a city under the authority of an ordinance of such city granting it "the privilege" of so doing, cannot be compelled to construct and operate a line on all of the streets for which it was granted such privilege.

In State *v.* Hartford, etc., R. Co., 29 Conn. 538, it appeared that the Hartford and New Haven Railroad Company was chartered to construct and operate a railroad from Hartford to the navigable waters of New Haven harbor. A steamboat company was afterwards chartered to run in connection with it to New York, and the railroad and line of steamboats constituted a route that was of great convenience to the public. After the construction of the road and the use of it in connection with steamboat for several years, the railroad company constructed a track diverging from the original track at a point a mile and a half from its terminus at tide water, and running to the station of the New York and New Haven Railroad Company, in the city of New Haven, and discontinued the running of passenger trains to the original terminus at tide water. This change incommoded travelers who wished to pass by the steamboat route, of whom there were many. *Held*, that a *mandamus* ought to be issued to compel the railroad company to run passenger trains to the original terminus. And the obligations of the lessor company as to equipment and operation devolve upon the lessee, and will be enforced by *mandamus*. People *ex rel. v.* St. Louis, A. & T. H. R. Co. (Ill.), 12 Am. & Eng. R. Cas., N. S., 227.

STATE *ex rel.* M. & J. KAISER WATER CO.

v.

CITY OF PHILLIPSBURG *et al.*

(*Supreme Court of Montana, June 5, 1899.*)

Construction of Contract for Use of Fire Hydrants.—A city in a contract for the use of a certain number of fire hydrants for 10 years had the right to take any additional number of fire hydrants at a certain annual rental, but the contract was silent as to the period for which the additional hydrants were to be taken. *Held*, that the city obligated itself to pay such rental for the additional hydrants from the time of their taking until the expiration of the 10 years.

Claims against Municipal Corporations—Mandamus.*—*Mandamus* will lie to compel a municipality to audit, allow, approve, and pay bills owing by it under a contract with a water company for the use of fire hydrants, although the water company has an adequate remedy by an action at law against the municipality.

APPEAL by defendant city from Granite county district court. *Affirmed.*

Case Stated.

Appeal from a judgment awarding to the plaintiff (respondent here) a writ of mandate requiring the defendant (appellant here) to audit, allow, approve, and pay the bills of the plaintiff water company for water furnished the city of Phillipsburg at the rate of $112.50 per annum for each of 15 hydrants, and at the rate of $100 per annum for each of 4 more, during the life of the water company's franchise. The petition for the writ of mandate avers the corporate capacity of the plaintiff water company, the municipal incorporation of the defendant the city of Phillipsburg, and that the other defendants are, respectively, the mayor, aldermen, and clerk of said city.

*See generally 2 Dill. Mun. Corp. (4th Ed.) §§ 849-861, 14 Am. & Eng. Enc. Law 165 *et seq.*

It is then averred that on January 5, 1893, a franchise was granted by ordinance to Michael and John Kaiser to lay pipes through the streets of Phillipsburg, and to supply the city and its inhabitants, through them, with water for a period of 10 years; that at the same time another ordinance was passed, in the nature of a contract for the supplying of the city with water, which provided as follows: "Now, therefore, in consideration of the said franchise, and of the completion and maintenance of the said water system according to contract, and for the further consideration of one hundred twelve and one-half dollars ($112.50) per annum per hydrant, the said town of Phillipsburg hereby contracts with the said Michael Kaiser and John Kaiser, their successors and assigns, for the use of fifteen nonfreezing double-discharge fire hydrants, to be supplied to said town for the period of ten years from the time in the year 189 that said water system is completed and said hydrants ready for use. Said hydrants to be always kept in working order by said Michael and John Kaiser, their successors and assigns, and to be always charged with water in quantity and pressure according to contract of said Michael and John Kaiser with said town. Said town of Phillipsburg to have the right at any time during said period of ten years to take any additional number of fire hydrants at the annual rental of one hundred dollars each. Said fire hydrants to be placed throughout the town of Phillipsburg as directed by the board of aldermen, and not to be used for any purpose whatever except by the authorities of the town of Phillipsburg." It is then averred that the M. &. J. Kaiser Water Company succeeded to the franchise and other rights of Michael and John Kaiser, and that the city of Phillipsburg is the successor of the town of Phillipsburg; that under the said ordinances the petitioner's plant was installed and operated with 15 hydrants until August 1, 1895, when the city required the water company to put in four more hydrants as provided for in the ordinance, which the petitioner did at a cost of about $1,000: that the city paid the petitioner all its bills presented monthly

thereafter as provided for in the ordinance, until the presentation of the bill of October, 1897, which the city refused to pay so far as it included amounts charged for the new hydrants, notice having been theretofore served by the city upon the water company that on and after October 1, 1897, it would discontinue the use and hiring of the four additional hydrants; that the hydrants are valueless except to the city of Phillipsburg; and that the water system is kept supplied, and the additional hydrants are always ready for use. The city interposed a general demurrer to the petitioner's application. A special demurrer was interposed by the individual defendants. The special demurrer was sustained, but the general demurrer was overruled. The city of Phillipsburg elected to stand on its demurrer. Judgment was thereafter entered in favor of the petitioner and against the city. From this judgment the appeal is taken.

Durfee & Brown, for appellant.
W. E. Moore and *T. J. Walsh*, for respondent.

HUNT, J. (after stating the facts). 1. The city of Phillipsburg refuses to pay the bill of the water company for the four additional hydrants it ordered the water company to put in, upon the ground that, under the clause of the contract ordinance which is quoted in the statement of the case, when the city ordered additional hydrants it entered into a yearly lease with the water company to hire such additional hydrants, and that, having an option to take the additional hydrants, it also had the option to stop the hiring at the end of a year, at the election of the city. Relying upon this construction of the contract, the city seeks to maintain the position that it elected to terminate its lease of the four additional hydrants it had ordered, and to discontinue the use of them, at the end of the second year's lease, after paying in full for the same. But in our opinion the agreement cannot receive that construction. Following the familiar principle that courts will not make an agreement for persons, but will

get at what their agreement is, we will look to the written words voluntarily employed by these parties, and to the effect of their language. We will also look at the whole of the ordinance constituting the contract, giving to every clause, and, if needs be, to every word thereof, a meaning,—all with a purpose to so construe the contract as to make effectual the objects and intentions of the parties. It is perfectly plain that for the 15 hydrants first mentioned in the contract the city was to pay for 10 years from the time in the year 1893 that the water system was completed and the 15 hydrants were ready for use. As to this there is no room for argument. The then present needs of the city, and the apparent certain future needs thereof, justified the agreement whereby 15 hydrants should be taken, and kept supplied and ready for use for 10 years, at an annual rental of $112.50 per annum per hydrant. Doubtless a possible decrease of the city's population, followed by requirements for less fire protection, was not considered of sufficient likelihood for the city to reserve to itself in the contract a right to discontinue the use of less than 15 hydrants for the fixed period of 10 years. But, whatever may have moved the parties in respect to the 15 hydrants, they made express provision for increased needs, if they should occur, by that clause of the contract which gave to the city the right at any time during the period of 10 years for which the 15 hydrants were taken to take any additional number of hydrants at an annual rental of $100 each. Acting upon this clause of the agreement, and presumably to meet the necessities of the municipality, the city took the 4 additional hydrants, requiring the water company to put them in, which it did at an expense of $1,000. As we interpret the agreement, the city had no right to order and take these additional hydrants upon any other basis than that upon which it took the first 15 hydrants, except in so far as it was expressly otherwise provided for in the ordinance itself. The stipulated annual rental of $100 for each additional hydrant, which was $12.50 less than for the first 15, is a circumstance tending to show that the meaning of the parties was that

additional hydrants, if taken, would be kept in use for a substantial period of time, which we construe to mean for as many years after the taking as there might be left to run under the 10-year period fixed for taking the 15 hydrants. It is reasonable to believe that some period of time was in the minds of the contracting parties, during which the city would be obliged to pay for the additional hydrants; but we find nothing in the language used to warrant the construction that the period contemplated was 1 year only, or the lease a yearly one, subject to termination at the end of that time. As we construe the contract, too, the obligation rested upon the water company to keep these additional hydrants supplied, and always in working order, charged with water in quantity and pressure according to the contract with the town made by the water company's predecessors, just as fully as it developed upon it to keep the 15 hydrants charged and ready. In other words, we are satisfied that the obligations of the contract imposed upon the water company in respect to the 15 hydrants for 10 years rested upon the company equally, as relates to all additional hydrants for the years they had to be supplied, while, on the other hand, the correlative duty lay upon the city to pay for the additional hydrants in the same manner and from the time they were taken until the lapse of the same period provided for in relation to the 15 hydrants. This construction insures, for the city a water supply to meet its growth, and avoids the very unreasonable view that either party can refuse to perform or revoke without just cause.

Construction of Contract for Use of Fire Hydrants.

As we regard it, the clause pertaining to additional hydrants, and stipulating for an annual rental therefor, was inserted, not to abbreviate the period of the contract's duration, which is ten years from the date that the 15 hydrants were ready for use, and is for as many years' use of the additional hydrants as there may be between the date of their taking and the time that the 10 years will expire since the taking of the 15 hydrants, but was to secure to the city an adequate water supply to meet its possible

future necessities, and to make certain that such supply would be furnished at a reasonable and fixed price per hydrant. The particular obligations resting upon the parties in case additional hydrants should be taken, though not set forth in express terms, must be ascertained by reference to that part of the provision of the contract governing the 15 hydrants. We have therefore read all the provisions together, and concluded that the 10-year clause and those parts of the provision which require the supply to be furnished under certain pressure, and to be kept in working order, cannot be disassociated from the clause authorizing additional hydrants, but is to be construed with it.

Claims against Municipal Corporations—Mandamus.

2. The next contention of the city is that the water company having a plain, speedy, and adequate remedy at law, under section 4703 of the Political Code, *mandamus* will not lie. Section 4703 provides, in part, that every city organized under title 3 of the Political Code, relating to cities and towns, may sue and be sued in all courts and places, and in all proceedings whatever, and has such other powers as are incident to municipal corporations, not inconsistent with the laws of the United States or of the state. The rule established by section 4703 was in force, however, at the time of the decision of this court in State *v.* City of Great Falls, 19 Mont. 518, 49 Pac. 15. In that case the court was obliged to pass directly upon the question whether or not *mandamus* will lie to compel a city to perform a duty imposed upon it by law,—to audit and allow proper bills it owes under the terms of a contract for a water supply, and to issue its warrant for the payment of the bills. It was held *mandamus* was a proper remedy. We cannot distinguish this case from that. It is true, as appears by the record, no demurrer was interposed in the Great Falls Case; but the question of the sufficiency of the petition was raised by an objection to the introduction of any evidence on the ground that no cause of action for a writ of *mandamus* was pleaded. We will not depart from the rule there announced, in this case, where the facts are so

very similar. This disposes of the only questions relied on in argument and brief. Judgment affirmed. *Remittitur* forthwith. Affirmed.

PIGOTT, J. I concur with HUNT, J., in his interpretation of the contract, and in the conclusion stated in the first paragraph of the foregoing opinion. In holding that *mandamus* is a proper remedy, the second paragraph of the opinion follows State *v.* City of Great Falls, 19 Mont. 518, 49 Pac. 15. I doubt the correctness of that decision in the respect mentioned, but "*stare decisis et non quieta movere.*"

BRANTLY, C. J., disqualified.

VILLAGE OF PEWAUKEE

v.

SAVOY *et al.*

(*Supreme Court of Wisconsin, May 16, 1899.*)

Title to Submerged Lands of Meandered Lakes.—Submerged lands of meandered lakes within the boundaries of this state belong to the state in trust for public use substantially the same as submerged lands under navigable waters by the rules of the common law, and the state cannot part with such title to the detriment of such trust.

Same—Effect of Raising Level.—The title of the state to submerged lands under the waters of navigable lakes will be extended so as to include lands covered by an artificial raising of the level of the lake if such artificial condition be continued so long as to become the natural condition.

Same—Same.—If a person artificially raise the level of the waters of a navigable lake so as to flood his own lands, the public rights in the lake will be correspondingly extended so long as such artificial condition exists.

Same—Same—Constructive Dedication.—If a person flood his own land by artificially raising the level of the waters of a navigable lake and maintain that condition for more than 20 years, and the public use and enjoy the lake in such new condition, the title to such lands, so far as necessary to maintain such condition, will vest

Village of Pewaukee *v.* Savoy

in the state by dedication. In such circumstances the artificial condition of the lake will be considered its natural condition, with all the incidents thereof.

Street Bordering Navigable Lake—Riparian Rights.—If a public street or highway exists so that its boundary line and the waters of a navigable lake meet, the riparian rights incident to the land composing the street belong to the public. In such a situation there is no zone of private right between the street and the lake, but the public right is continuous from the street to the waters of the lake and from the waters of the lake to the street.

(Syllabus by the Judge.)

APPEAL by defendants from Waukesha county circuit court. *Affirmed.*

Appeal from the circuit court of Waukesha county from a judgment restraining defendants from placing a fence along the street line to obstruct the passage therefrom to the adjoining waters of Pewaukee Lake. It was claimed by defendants that the land from the street line back some distance into the lake, reaching to where the water came in a state of nature, was private property; that though such land had been submerged for a long term of years by an artificial raising of the lake level, the owner had a right to reclaim the land and exclude the public from passing over it to the line of the lake level as it existed in a state of nature. Plaintiff commenced the action on the theory that, though the land immediately outside of the street line originally was not lake bottom and but for the artificial raising of the lake would belong to defendants, such artifical condition had permanently established a new level reaching to the street line, so that what was formerly private property between such line and the line of the lake bottom became the property of the state the same as the lake bed in its natural condition. The cause of action and right to relief depended on whether the artificial raising of the lake and the maintenance of it for a long term of years extended the public ownership of submerged lands, so as to include that which was thereby, but was not formerly, covered

Case Stated.

by water. The issues raised by the pleadings were decided substantially as follows:

(1) Pewaukee Lake, a meandered, navigable body of water, about five miles long and averaging about three-fourths of a mile wide, commonly used by the public for boating and fishing since prior to 1873, is situated within the boundaries of plaintiff, a duly incorporated village under the laws of this state.

(2) Main street, a much used public thoroughfare in the village, is located in part along the east end of the lake so that its submerged land reached the line of the street on the west side thereof.

(3) Upwards of 20 years prior to the commencement of this action the water of that part of the lake on the west side of the street, between an iron stake near Savoy's hotel and Desso's blacksmith shop lot, has continuously flowed, naturally, to the street line, and the street has been in constant use as a thoroughfare for public travel in reaching the lake, by all persons desiring to enjoy the common rights therein.

(4) On the 19th day of June, 1896, the trustees of the village, by ordinance duly passed according to the laws of this state, established that portion of the lake bordering on the street as aforesaid as a harbor for all kinds of craft used in navigating the lake, and provided for the regulation of docks, wharfs and boat houses in and at such harbor.

(5) March 30, 1898, defendants constructed a barb-wire fence along the street line on the lake front within the territory above indicated, so as to wholly obstruct public travel from the street to the lake and from the lake to the street, which fence was removed by the village authorities, but would have been restored and the public way permanently obstructed had defendants not been enjoined by the court in this action from so doing till the right of the parties could be judicially determined.

(6) The level of the water in the lake was artificially raised, about 1838, by a dam which forms the street within

the points mentioned, which condition has since existed substantially without change, by means of which the disputed strip of land along the lake front, bounded on the east by the west line of the street, which was formerly dry land, has since been covered by water.

(7) The trustees of the village authorized the commencement of this action.

From the aforesaid facts the court found the public rights in the lake between the points mentioned reached the boundary of the street, no private zone separating the two, and that plaintiff was entitled to a permanent injunction restraining the defendant from interfering with the public travel to and from the lake or the navigation of the lake within such territory. Judgment was entered accordingly from which this appeal was taken.

T. W. Haight, for appellants.

Ryan & Merton, for respondent.

MARSHALL, J. (after stating the facts). It is the settled law that submerged lands of lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the state into the Union the title to such lands, by operation of law, vested in it in trust to preserve to the people of the state forever the common rights of fishing and navigation and such other rights as are incident to public waters at common law, which trusteeship is inviolable, the state being powerless to change the situation by in any way abdicating its trust. Priewe *v.* Improvement Co., 93 Wis. 534, 67 N. W. 918; Club *v.* Wade, 100 Wis. 86, 76 N. W. 273; Illinois Cent. Railroad Co. *v.* Illinois, 146 U. S. 387–452, 13 Sup. Ct. 110; Shively *v.* Bowlby, 152 U. S. 1, 14 Sup. Ct. 548; Revell *v.* People (Ill. Sup.) 52 N. E. 1052.

Title to Submerged Lands of Meandered Lakes.

The title of the state to submerged lands, and the inviolability of the state's trustee relation thereto, as indicated,

is not questioned by appellants, but it is contended, as regards the lake in question, that the state's title is limited to lands that were covered by water before the lake level was artificially raised; that though the artificial water line now reaches the street, there is a strip of submerged land between that and the boundary of the former lake level, conceded to belong to defendants if their theory of the law is correct, to which the state has no title and which they have a right to reclaim from its artificial condition and to exclude the public therefrom. So the primary question upon which the appeal really turns is, has the maintenance of the artificial level of the lake for upwards of 20 years given to the new level, as regards title to submerged lands, all the characteristics of a natural lake to the same extent? The trial court answered that in the affirmative. No other conclusion could have been reached consistent with recent decisions of this court on the same subject. In Smith *v.* Youmans, 96 Wis. 103, 70 N. W. 1115, it was held that an artificial condition of a water course or body of water, maintained for such length of time as to confer the right by prescription to maintain it permanently, is to all intents and purposes the natural condition. That was a case of the artificial maintenance of an artificial lake level for more than 20 years substantially the same as in this case. True, the ultimate question for decision was, has a riparian proprietor, in the circumstances mentioned, the right to insist upon the artificial level of the water being maintained? but the conclusion was reached, as a deduction from the general principle that an artificial condition of a body of water, maintained for more than 20 years under such circumstances as to extinguish the right of the owners of land affected by it to object to its continuance, becomes its natural condition with all the incidents thereof. The same subject was before the court again in the very recent case of Club *v.* Anderson (Wis.) 78 N. W. 185. True, the question there was whether the common rights of fishing and navigation extended correspondingly to an artificially

Same—Effect of Raising Level.

increased level of the lake that had been maintained for about half a century, and it was decided in the affirmative. But as in Smith *v.* Youmans, the result was reached as a deduction from the principle that an artificial condition, by lapse of time, under such circumstances as were shown, becomes the natural condition. Having determined the governing legal principle, it was said in the first case, that riparian rights must be determined with reference to the artificial level the same as if it were the natural level; and in the last case that the right to fish and hunt and navigate must be determined with reference to the artificial condition, the same as if it were the natural condition; and in this case the court held that the title to the bed of the lake must be determined with reference to the artificial level of the water the same as if it were the natural level. It can easily be seen that each conclusion was a logical result of the existence of the principle common to all. There is no escaping that. If the principle is right the results followed necessarily. When we say that the new level of the lake has become its natural level, we say that the title to all the submerged lands in the present condition of things is in the state; that the entire body of water is subject to the common right of fishing and navigation and to the other incidents of navigable waters, and that the title to lands bordering on the lake stops at precisely the same line that would govern if the water, in a state of nature, reached to the height of its artificial condition.

The above stated principle having been, upon due consideration, firmly declared to be the law, on the several occasions indicated, it is sufficient now to refer to our previous adjudications without rediscussing the subject at length or reviewing the holdings of other courts. Our attention is called to some authorities to the effect that mere permissive use by one or several persons, of the property of another, however long continued, will not take the title of the latter and vest it in the former. That doctrine is familiar, but we fail to perceive its application to this case. The land in con-

troversy here was artificially taken into the lake by the owner about the time the land was acquired from the United States in 1839, and its condition in that regard has been since maintained by those in the chain of title from the original owner down to about the time of the commencement of this action. When the owner of the land raised the lake level so as to cover it, such land immediately became subject to use by the public as a part of the natural lake bed, not by permission of the owner of the paper title, but by the same right that the public used any other part of the lake. The owner of the land possessed no right to exclude the public therefrom so long as the waters of the lake were caused to flow over the same. The principle is well settled that if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased. Whisler *v.* Wilkinson, 22 Wis. 572; Volk *v.* Eldred, 23 Wis. 410; Weatherby *v.* Meiklejohn, 56 Wis. 73, 13 N. W. 697; Smith *v.* Youmans, *supra*; Club *v.* Anderson, *supra*. As the chief justice put it in the Mendota Club Case, the public may use the increased volume of water the same as though it had always been in that condition; that the right existed from the start. So long as the artificial condition existed, the person holding the title to submerged lands could not exclude the public therefrom.

Same—Same.

It is not difficult to see how a person who, by artificial means, makes his land a part of the bed of a navigable lake so that the water flowing over the same is rightfully used as a part of the public waters and continues that situation for a long time, loses the right to change the condition. The creation of the condition, knowing that the public will have a right to enjoy it, necessarily carries with it a presumed intention that they shall enjoy it. A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change his position and restore the

Same—Same—Constructive Dedication.

original situation, brings into play the principle of estoppel *in pais*, which precludes him from revoking what is legally considered a dedication of his land affected by his acts, to the public use. 3 Washb. Real Prop. p. 79. Riparian proprietors may make nonnavigable waters, even, public waters by dedication. Yates *v.* Judd, 18 Wis. 118. Uninterrupted and continuous use, acquiesced in for 20 years, constitutes conclusive proof of dedication. Lemon *v.* Hayden, 13 Wis. 159; Wyman *v.* State, *Id.* 663. It does not militate against the effectiveness of acts to create a right to land by dedication that the owner does not so intend, if such be the legal effect of his conduct. Williams *v.* Smith, 22 Wis. 594. Applying those principles to the facts of this case, it is easily seen that the conduct of the owners of the property in dispute in this case, in maintaining an artificial condition of the waters of Pewaukee Lake for some 50 years, which they knew gave to the public the right to enjoy it as a natural condition, hence intended that such should be done, and the use accordingly operated most effectively to dedicate all lands owned by them affected by such condition, to the public use, and to surrender to the proper custodian all lands devoted to such use, the title necessary to maintain and protect it. There is no taking of lands for public use contrary to the will of the owner without just compensation in the circumstances of this case, but a mere acceptance of lands voluntarily surrendered to the public use by the owner, which surrender, by reason of the facts, the owner is precluded from revoking or interfering with, so that, as a consequence, in effect at least, the title to the lands is vested in the state to the same extent as that of lands constituting the original natural bed of the lake.

Street Bordering Navigable Lake —Riparian Rights.

It follows from the foregoing that the public right to the bed of Pewaukee Lake, within the limits affected by the judgment appealed from, reaches to the line of the street; and it necessarily follows that defendants have no right, by reason of a qualified title to the street on the side towards the lake,

if they have such qualified title, to claim riparian rights as an incident thereto. In such situations the wharfing privileges and other incidents of the shore are appurtenant to the public right in the street, leaving no line of paramount private right between the street and the water. Said JUSTICE MATTHEWS, in Potomac Steamboat Co. *v.* Upper Potomac Steamboat Co., 109 U. S. 672, 3 Sup. Ct. 445, and 4 Sup. Ct. 15: "It never was questioned that, as to streets whose termini abutted on the river, the water front was subject to the riparian rights of the public for use as wharf, dock or landing places." "And the same rule applies to a situation where the street line and the water line coincide. The true inference to be drawn from so locating a street is that it was intended to secure to the public those very rights, and to prevent private monopoly of the landing places for trade and commerce." To the same effect is Rowan's Ex'rs *v.* Town of Portland, 8 B. Mon. 232, where it was held that if a street line and the line of a navigable river coincide, the wharfing privileges are in the public to the exclusion of the original proprietor. Likewise, in People *v.* Lambier, 5 Denio, 9, it was held, in effect, that where a public street connects with navigable waters, the fact that the fee of the street is in private hands does not permit the taking, by reason of private ownership, of land beyond the original street boundary for private purposes; that the result of a filling up beyond the original terminus of the street will be to extend the street correspondingly so as to preserve the right of public passage from the water to the street and from the street to the water. In Barclay *v.* Howell's Lessee, 6 Pet. 498, a claim inconsistent with the foregoing was thus repudiated: To contend that between the boundary of a street and the public right to navigable water, where the two meet, as in case of the existence of a street bounded by a navigable river, a private right can exist and be exercised hostile to the public right, is unreasonable and against law. For further authorities on the subject, see City of Newport *v.* Taylor's Ex'rs, 16 B. Mon. 699; Barney *v.* Keokuk, 94 U. S. 324; Mayor, etc., of

New Orleans *v.* U. S., 10 Pet. 662; Godfrey *v.* City of Alton, 12 Ill. 29; Backus *v.* City of Detroit, 49 Mich. 110, 13 N. W. 380.

A suggestion is made in regard to the right of the village corporation to maintain this action. That subject is covered by City of Madison *v.* Mayers, 97 Wis. 399, 73 N. W. 43, and many previous cases in this court. A municipality may maintain an action for an injunction to prevent interfering with its streets. There are many instances in our Reports where the right to maintain such actions has been sustained. Town of Neshkoro *v.* Nest, 85 Wis. 126, 55 N. W. 176; Town of Jamestown *v.* Chicago, B. & N. R. Co., 69 Wis. 648, 34 N. W. 728; City of Oshkosh *v.* Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489; Waukesha Hygeia Mineral Spring Co. *v.* Village of Waukesha, 83 Wis. 475, 53 N. W. 675; City of Eau Claire *v.* Matzke, 86 Wis. 291, 56 N. W. 874. The question seems to have been so completely foreclosed as not to be open to discussion. The right to maintain the action is based on the duty of the municipality to maintain its streets in a proper condition for public travel. By subdivision 11, § 893, Rev. St., village corporations are expressly empowered to prevent the obstruction of their streets. That has been held to carry with it by implication the right to maintain an action for injunctive relief as an appropriate means for carrying out the express power. Village of Buffalo *v.* Harling, 50 Minn. 551, 52 N. W. 931. Standard text writers support the same doctrine. Beach, Inj. §§ 1284, 1285. It applies here, as the real purpose of this action was to prevent threatened obstruction to the proper use of a street.

What has been said seems to cover all questions of sufficient moment to require special mention in this opinion.

The judgment of the circuit court is affirmed.

MAYOR, ETC., OF CITY OF BURLINGTON

vs.

PENNSYLVANIA R. CO.

(*Court of Errors and Appeals of New Jersey, June 19, 1899.*)

Railroads in Streets—Municipal Powers.—In 1833 the municipal authorities of Burlington had no power to grant to the Camden & Amboy Railroad Company the right to construct and operate a steam railroad longitudinally through a street in the city.

Same—Special Acts—Constitutional Law.—An act of the legislature, passed in 1896, to ratify and confirm such a grant, would be, if operative for the laying of additional tracks, a special law "granting to the corporation the right to lay down railroad tracks," and therefore a violation of the constitutional interdict against such special laws.

(Syllabus by the Court.)

APPEAL by defendant from court of chancery. *Affirmed.*

Joseph R. Gaskill and *Samuel H. Grey*, *Atty. Gen.*, for appellant.

Howard Flanders and *Samuel W. Belden*, for respondents.

DIXON, J. The object of the bill in this case is to restrain the defendant from laying a steam-railroad track longitudinally through Broad street, in the city of Burlington, and to compel the removal of such portion of said track as was in process of construction when the bill was filed. The defendant claims the right to lay this track by virtue of an agreement made in 1833 between the city of Burlington and the Camden & Amboy Railroad & Transportation Company, the lessor of the defendant. For the reasons given by VICE CHANCELLOR REED in advising the order now under review, we think that agreement was, when made, beyond the powers delegated by the legislature to the municipality, and was, therefore, void,

Railroads in Streets—Municipal Powers.

so far as it purported to impair the public easement in the highway.

Same—Special Acts—Constitutional Law.

The defendant further insists that the legislature ratified this agreement by a statute passed April 9, 1896 (P. L. 1896, p. 228), and that consequently it is now as effective as if originally authorized. The clause of this statute thus invoked enacts that any contract theretofore made by any city not of the first class, with any railroad company whose road then entered or lay within the city, or whose route had been located therein, which contract granted to the company the right to lay its road and construct its tracks in, through, along, and upon any of the roads or streets of the city, was by said statute fully authorized, ratified, and confirmed. The terms of the statute, if operative, would have the force for which the defendant contends; but we think that to allow them such force would be in violation of the constitutional provision which forbids the passing of local or special laws "granting to any corporation, association, or individual the right to lay down railroad tracks." As we are of opinion that, before the passage of this statute, the defendant had not the right to lay the track now in controversy, and the right could only be derived from the legislature, evidently, if by force of the statute such a right was obtained, the statute, within the meaning of the constitution, granted the right to lay the track; and the question then arises whether, in that feature, the statute is local or special. In considering this question it should be noted that this provision of the statute is distinguishable from enactments which merely remedy the defective or irregular execution of existing powers. The legislature had never even attempted to authorize the city of Burlington to burden the public highways with steam railroads running thereon longitudinally. Hence the statute cannot be regarded as the mere waiver of formal objections, which a principal might, but need not, interpose against the act of an agent. It is itself the sole source of legislative authority. The railroad companies which, at the passage of this statute,

had void "contracts" with any city of the state not of the first class, were certainly few in number. So far as appears in this case, that before us is the only one. But, if there be others, we do not see how the possession of such writings could form a rational basis on which those companies might be deemed a distinct class for the purpose of receiving from the legislature an absolute grant of the right to lay tracks within municipalities which at any time in the past had assented to the writings. Necessarily, the statute can operate only in particular and exceptional instances, whether the companies or the municipalities be regarded; and neither the companies nor the municipalities differ from others of similar character in any point relevant to the object of this law, save that they have mutually executed writings which intrinsically are without legal force. Such a circumstance is too insignificant and unimportant to justify and support the classification suggested. We therefore think this provision of the act is special, and unconstitutional.

The defendant further urges that, as it had paid to the city $100 annually since the agreement was made, in accordance with the contract, and as the consideration for the rights which it purported to confer, the city is estopped from denying the validity of the grant. But these payments have been received by the city in its proprietary capacity only, and cannot be made a ground for absolving the municipality from its governmental duty of preserving the public highway from illegal obstruction. As to the allowance of a preliminary injunction when the infraction of the public right is clear, the case of Easton & A. R. Co. *v.* Inhabitants of Town of Greenwich, 25 N. J. Eq. 565, affords a satisfactory precedent. The order appealed from should be affirmed.

CITY OF SHREVEPORT

v.

PRESCOTT *et al.*

(*Supreme Court of Louisiana, April 17, 1899.*)

On Motion to Dismiss.

Case at Bar—Jurisdiction.—The matter at issue, being a question of local assessment or charge upon the property of abutting proprietors in a municipality, levied upon compulsion of law alone, to pay the cost of street improvement, and without their knowledge or consent, is a tax, in the sense of the constitutional provision conferring appellate jurisdiction on this court.

Public Improvements—Levees and Streets.—There can be no difference or distinction in principle between a forced contribution for levee purposes and a forced contribution for street improvement.

Local Assessments and Taxes—Distinction.—While it has ever been held with practical unanimity in numerous decisions of this court that the portion of the cost of the paving and improvement of streets and banquettes in cities and towns, which is, under the law, chargeable to abutting property owners, is not a tax, in the sense of the jurisdictional article of the constitution, yet the reason for so holding evidently is that, under the provisions of the different city charters, such assessments were based primarily upon petitions signed by the abutting property owners, and consequently not predicated upon the fiat of the legislature, notwithstanding same are levied upon the theory of local benefits conferred upon the property of said abutting proprietors.

Same—Same.—The feature which distinguishes local assessments for public state purposes from those for city street improvement is, in all laws except the one under consideration, the assent of the property owner.

Taxation—Jurisdiction—Statute Construed.—This court affirms the proposition announced in State *v.* Judges of Court of Appeals, 16 South. 219, 46 La. Ann. 1292, to the effect that "the use of the words 'all cases,' and of the words 'any tax, impost or toll whatever,' clearly indicates on the part of the framers of the constitution an emphasized intention to give to the terms 'tax,' 'toll,' and 'impost'

the widest meaning to which they are susceptible, and to allow every citizen to have submitted to the test of legality and constitutionality, by the highest court of the state, any charge upon his property imposed by the state or its subordinate political agencies, when claimed to be legally and constitutionally imposed by them in aid of governmental purposes, whether extending over the whole state, or over particular localites"; and, further, that "it is manifest that the word 'tax' in this part of the constitution, is used in its largest sense. After the words describing the jurisdiction of this court as extending to all cases involving the legality or constitutionality of any tax, toll, or impost, there is added the word 'whatever'; *i. e.* whatever the character of that tax, toll, or impost."

Same—Same—Same—Case at Bar.—The present controversy comes clearly within the reason and spirit of that decision, because the cost of the local assessment therein involved is a tax, within the intendment of the jurisdictional article of the constitution.

On the Merits.

Paving Streets—Distribution of Cost—Ordinances.—This suit involves an interpretation of an ordinance of the city of Shreveport which requires that abutting property holders throughout the length of a street that has been paved shall pay two-thirds of the cost of same, each one paying in proportion to frontage; that the street railroads shall pay in proportion to the space occupied by their roadbed, compared to the width of the street; and that the city shall pay the remainder,—this assessment having been made in pursuance of Act No. 10 of 1896, and wholly without the assent of the abutting property holders. The ordinances is founded upon the supposed authority that is conferred by the second section of said act, which provides that abutting owners shall pay two-thirds of the entire cost, and the corporation shall pay one-third from its general resources, and provided that, where a railway bed or track occupies a part of the street, it shall pay in proportion to the space occupied by its roadbed, compared with the width of the street. Finding, upon comparison of the city ordinance with the statute, that the former has transposed the terms of the latter by stating (1) the share of the abutter to be two-thirds, (2) that of railroad companies in proportion to the space occupied by them, (3) the city should pay the remainder, whereas the latter states (1) the share of the abutter shall be two-thirds, (2) the city one-third, and, (3) provided that a street railway occupies a portion of the street, it shall pay in proportion to said space, same are irreconcilable.

Same—Same—Ordinance Conflicting with Statute.—Entertaining the view that the ordinance is not in keeping with the terms of the

City of Shreveport *v.* Prescott

statute, the true import of which is to require the portion of the cost due for street improvement by railroad companies to be first deducted from the total amount, and the remainder distributed between the abutters and the municipality, two-thirds to the former and one-third to the latter, same is declared null and void.

Same—Same—Liability of Street Railway Company.—The uniform current of judicial opinion affirms the principle that the right of occupancy of a portion of the streets of a municipality by a street-railway corporation is property which is benefited by a street improvement, to the extent of the space occupied by its roadbed and tracks, which renders same liable for its proportionate share of its cost, just as the property of abutting property owners is liable; that the railway company using the streets for the operation of its cars is in duty bound to pay the work on the streets which its track alone makes necessary,—that is to say, all expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof.

Same—Same—Abutters Not Liable for Cost of Paving Track.*—That in no case can any portion of the cost of such improvement be attributed to, or assessed against, the abutting property owners.

Same—Same—Same.—That, when a statute or municipal ordinance makes provision for the assessment of a street-railway corporation for the pavement of such space as its tracks and roadbed occupy, such provision is mandatory, and any portion thereof which is put upon the abutting property owners is illegal and void.

Same—Same—Same.—The very object and aim of such a statute as the act in question is to relieve the municipality and abutting owners, proportionately, from defraying any portion of the cost incident to the part of the street improvement covered by the tracks of a street railway

Same—Same—Space Occupied by Track.—The space occupied by a street-railroad company is matter of proof, to be administered and determined in some proceeding contradictorily between all parties in interest,—the municipality, the abutting property owners and the street-railway companies; and the ordinance which arbitrarily fixes said space, without a contradictory hearing, cannot be sustained as valid.

(Syllabus by the Court.)

APPEAL by defendants from parish of Caddo judicial district court. *Reversed.*

*See note at end of case.

City of Shreveport *v.* Prescott

Thomas C. Barret, *J. Henry Shepherd*, and *Allen Rendall*, for appellants.

E. H. Randolph, *City Atty.*, for appellee.

On Motion to Dismiss Appeal.

WATKINS, J. The motion to dismiss is grounded on the want of jurisdiction of this court, *ratione materiæ*, the amount in dispute being less than $2,000. The contention of the defendants and appellants is that this court has jurisdiction, for the reason that the question at issue is the constitutionality and legality of an assessment or forced contribution for street improvement, which was levied by compulsion of law, and without the consent of the abutting proprietors; that the assent of the property owners was in no way required, and that they had no voice whatever in the matter; that the law under which the proceedings complained of were taken authorized the city council to levy the charge by simple ordinance, without any precedent application of the property owner. Act No. 10 of 1896. Their contention further is that the ordinance of the city council imposes a tax or local assessment upon the property holders on three streets, which are included in the paving contract, aggregating seventy or eighty thousand dollars in value,—the portion of no one of the taxpayers amounting to a sum equal to two thousand dollars. The foregoing contentions are predicated upon the principles announced in State *v.* Judges of Court of Appeals, 46 La. Ann. 1297, 16 South. 219, and Railroad Co. *v.* Sheriff, 47 La. Ann. 706, 17 South. 249. The purport of the contention of appellants' counsel is that such a local assessment is a tax, within the jurisdictional sense of article 81 of the constitution of 1879 and article 85 of the constitution of 1898. On the other hand, the contention of appellee's counsel is that the principles announced in Fayssoux *v.* Denis, 48 La. Ann. 850, 19 South. 760, are different from those announced in the decision relied upon by appellants' counsel, and should control; but appellants' counsel insist that the same are not in conflict, for the reason

Case Stated.

that the assessment under discussion in Fayssoux *v.* Denis was predicated upon the assent of the property holders, and that the proceedings for its assessment were inaugurated by them; that in such case, the assessment not having been levied solely and alone on the authority of law, either by an ordinance of the city council or an act of the legislature, it does not possess the characteristics of a tax, even in a jurisdictional sense, but the one in question here, having been levied by compulsion of the law alone, is a forced contribution, and a tax, within the contemplation of the aforesaid articles, defining the jurisdiction of this court.

This suit is one brought by the city of Shreveport, for the use of the street contractor, against the defendants, who refuse to pay the amount charged to them for paving the street with vitrified brick in front of their respective properties: and the amount claimed from each is not more than $2,000, and in the aggregate does not exceed $500 against all three defendants. The petition alleges that in pursuance of law the city entered into a contract with one Talbot, after observance of all due and legal formalities, to pave Texas street, part of Common street and Texas avenue up to Jordan street, at the rate of $1.87 per square yard; that said paving provided for in the contract had been completed, and that the city has accordingly levied local assessments on the abutting properties so as to apportion two-thirds of the contract price on the said real estate on the basis of their respective frontages, according to law; and that the portion due under said assessment charged against the defendant Prescott is $408.27, less $324.13 already paid; that against J. S. Rendall is $415.85, less $333.18 already paid; that against Mrs. H. Simon is $411.40, less $212 already paid. The further averment of the petition is that the local assessments against said properties have been duly recorded, and are privileged on same, and against the owners thereof, and that the partial payments were made by said defendants as aforesaid; but they refuse to pay the balance, on the ground that the law does not charge their properties to the extent of

two-thirds of the contract price, and that the city council has no authority to levy a local assessment to that extent on said properties; that said amounts are justly due, and for which they pray judgment against the defendants, with recognition of privilege on the said properties, and for the enforcement thereof.

The parts of the appellants' answer responsive to the motion to dismiss are that "they allege that certain of the property holders on Texas street, relying on representations made by the city officials that the assessments made against their property on account of this improvement were only such as the law contemplated and allowed, have paid same; but the respondents and other property holders * * * object to the amount claimed by the city, as excessive, exorbitant, and unwarranted by law, and oppressive. * * * They show that the city council and city officials have put a forced, strained, and illogical construction or interpretation upon the paving statute aforesaid, claiming under it the right to appropriate to the city, as a credit on the one-third of the expense of paving, which the law declares it must pay, the amount exacted from the street-railway company whose tracks occupy the several streets." Respondents aver there is no warrant in law for this. On the contrary, they show that the language of the statute is plain and clear, to the effect that, where street railways occupy a part of the streets paved, two-thirds of the cost of improvement is to be borne by the abutting property owners and the railroad, the latter paying in proportion to the space it occupies, compared with the width of the street, and "that this leaves the city (as the law says it shall) one-third of the expense of the improvement; * * * that the city officials decline to accept either of these interpretations, and arbitrarily demand more than the law permits to be exacted from the property owners; that respondents, and a large number of property holders similarly situated, resist this exaction; and that not more than one-third of the abutting property owners on the three streets included in the paving contract have paid the amount

demanded by the city, and those who have paid it did so in error. * * * They show further that the city council of Shreveport by ordinance has reduced, or attempted to reduce, the space for which the railroad company must pay, from 16 to 9¼ feet, and they allege that this cannot be done at the expense of abutting property holders on said streets." Lastly, "respondents aver the unconstitutionality and illegality of the statute under which the city claims to act, and of the city ordinance under which these pretended assessments were made, the same contravening the provisions of articles 1, 6, 48, 203, 209, 218, and other articles, of the constitution of 1879, and because this is an attempt to enforce a system of local improvements without reference to the assent of property owners for whose benefit the paving is supposed to be done."

Therefore the question is whether this court has, or can entertain, jurisdiction of this case. The language of the constitution relied upon is that the appellate jurisdiction of this court shall extend "to all cases in which the constitutionality, or legality of any tax, toll or impost whatever * * * shall be in contestation," etc. Const. 1879, art. 81. The language of the present constitution is the same. Const. 1898, art. 85. Hence the only question to be determined is whether the local assessment sought to be enforced is a tax, within the sense of that constitutional provision.

Case at Bar—Jurisdiction.

The legislative act upon which the ordinance of the city of Shreveport is founded is, as its title declares, one to empower cities and towns (the city of New Orleans excepted) having a population exceeding 10,000 to pave or otherwise improve the streets and alleys thereof, and to levy and collect special taxes and local contributions on real estate abutting the same, to defray part of the cost of such work of improvement. Section 1 provides that the municipal authorities of any such town or city "shall have the power to pave, plank, gravel, macadamize or otherwise improve the streets and alleys, or any part thereof, * * * and shall have the power to levy

and collect special taxes on the real estate abutting the street or alley to be improved for the purpose of defraying a part of the cost of such work or improvement." Section 2 declares "that the owners of real estate so abutting, shall pay two-thirds of the entire cost of such work or improvement, and the corporation shall pay one-third out of its general resources: provided that where a railway bed and track occupies a portion of the street, it shall pay in proportion to the space occupied by its roadbed, compared to the entire width of the street." Section 3 provides "that whenever the city council of cities herein described shall resolve to pave or improve any portion of streets or alleyways not less than one block, or any street or alley, it shall pass an ordinance calling for bids for the work, of which ten days' notice shall be given in a newspaper published in said city, and shall let the contract to the lowest responsible bidder; * * * and after the contract has been awarded, the council shall provide by ordinance for an assessment on real estate abutting the street or alley, and on railroad tracks as aforesaid, a portion whereof is to be paved or otherwise improved, in such manner as to apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting, and on the railroad track, in the proportion as set forth in section two hereof." Section 4 provides "that the sum assessed against said real estate and railroad track and roadbed, shall be due and collected within ten days after the completion of the work and its acceptance by the mayor and city engineer; and if not paid within the said ten days, the municipal authorities shall have the power to proceed by suit against the said owners and said real estate and railroad company and track to collect the delinquent assessment, and the said municipality shall have a privilege on said property or properties, to secure the payment of the sum assessed, * * * which privilege shall be a first privilege over all other claims, except taxes."

From the provisions of the foregoing statute, it is perfectly clear that the municipal authorities of the cities and towns

specified were given plenary power to pave or otherwise improve the streets and alleys thereof, and to charge the abutting proprietors two-thirds of the entire cost of such work of improvement, without in any way consulting their wishes or obtaining their consent, either by petition, or at a special election held for the purpose. This statute is *sui generis*, and differs in every material respect from statutes in regard to street improvement generally. Therefore it is equally clear that the point is well taken by appellants' counsel that the street paving, and the resulting local assessment on their properties, were by the operation of the statute and the ordinance, exclusively, and without the concurring assent of the abutting proprietors. We make the following quotations from the brief of defendants' and appellants' counsel, as best and most accurately stating the grounds of their resistance to the motion to dismiss their appeal, *viz.*: "Undoubtedly, what is involved in this suit is a charge upon property, a forced contribution, levied by compulsion of the law. The abutting property owners had no voice whatever in the matter. *Nolens volens*, an onerous exaction, a heavy imposition is assessed against them and their property. It is for a public purpose, *viz.* the paving of a public street, the main thoroughfare of the city, two and a half miles long. The evidence shows the work is to cost about $120,000, more than two-thirds of which the city seeks to impose upon the abutting property. This is a test case. Its decision affects the most valuable property in the city, and hundreds of taxpayers, many of them with small holdings, unable to meet the exaction. And yet we are told it is not a tax, and we cannot have reviewed by this high court that part of the imposition challenged for illegality! The fact that the assessment is levied upon abutting property, upon the theory of supposed benefits, does not make it any the less a tax. The hand of the law reaches out and enforces the exaction, determining, alone and independent of the property owner, that the improvement benefits his property, and he must pay. This is absolutely as much a 'tax' in the broad

sense of that term, as it is possible for anything to be. * * * The state constitution declares that the appellate jurisdiction of the supreme court shall extend 'to all cases in which the constitutionality or legality of any tax, toll or impost whatever shall be in contestation, whatever may be the amount thereof.' Const. 1879, art. 81; Const. 1898, art. 85. Observe the broad scope of the words,—'any tax whatever,' 'any impost whatever.' They include any and every exaction, charge, contribution, burden, or tribute levied on the citizen or his property. Whenever money or funds are demanded by the law from the citizen, or assessed against his property, no matter what the form or method of taxation, —whether for general purposes or for local benefits,—the language of the constitution is intentionally made broad enough to cover it, and this honorable court may review its constitutional and legal features." Again: "Whatever the constitution of other states may have intended or not intended by the words 'tax' or 'taxes,' as used in them, it is clear that, when the constitution of Louisiana came to define the appellate jurisdiction of this court, it used language of the most latitudinous significance, in vesting this court with the right of review of all cases where the legality of any kind of tax or tribute or exaction or burden placed upon the citizen or his property is in contestation, without regard to the amount in dispute." After having made an examination and analysis of the pertinent decisions of this court in regard to the constitutional jurisdiction of this court in cases involving the legality of local assessments made by authority of the general assembly for levee purposes, counsel say: "There can be no difference or distinction in principle between forced contributions for levee purposes and forced contributions for other improvements. All alike, to be valid, must be for public purposes. Where the charge is put upon the property of the citizen by the law, where it is in this sense a forced contribution, where he has no voice in the matter, where it is done without asking his

Public Improvements—Levees and Streets.

consent or that of his fellow abutting property holders, where it is a levy resting on the compulsion of the law, operating through the state government, or that of one of its political subdivisions, it is no longer an open question that this court has jurisdiction; that it comes within the meaning of the words 'any tax, toll or impost whatever'; that it is a tax or impost in this sense. The forced contribution in the instant case is for a public purpose, to wit, the paving of a public street in the city of Shreveport."

Per contra, the contention of the plaintiff's counsel is tersely put in the following quotation from his brief, *viz.*: "Therefore the only inquiry is, is this a suit or proceeding to enforce a tax? A suit to recover from abutters their proportion of the cost of paving a street has never been held to be a suit to enforce a tax. On the contrary, it has always been held in the negative, and, in the face of numerous decisions of this court (one of them in 1896), appellants have held up the collection of the judgment against them by appealing here; and hence we ask a dismissal, with penalty, as prayed for in motion to dismiss. There is an unbroken line of opinions of this honorable court, from 48 La. Ann. 852, 19 South. 760, back into the Robinson Reports, declining to take jurisdiction on such suits unless the amount in dispute was more than $2,000. The latest authority (48 La. Ann. 852, 19 South. 760) should put such question at rest."

The decisions of this court have repeatedly held that local assessments were not taxes *eo nomine* (that is, in the ordinary sense of that term, as it is employed in the constitution), but that they are taxes in the more general signification that they are a charge put upon property by authority of the law-making power. The general distinction that is taken between taxes and local assessments, by courts and authors, is that the former are forced contributions levied by the government alike upon all property, for the purpose of raising revenue for the support of the government, without reference to the benefit that the taxpayers may derive there-

from, while the latter are also forced contributions which are levied by the government, but upon certain particular property, and with a view of raising revenue for certain designated purposes, having direct reference to the special benefits that will inure to the property thus taxed. It will serve no useful purpose to examine and analyze those authorities. It has also been held with practical unanimity in numerous decisions of this court that while the portions of the cost of the paving and improvement of streets and banquettes in cities and towns which are, under the law, chargeable to abutting property owners, are local assessments, yet they are not taxes, in the sense of that article of the constitution which confers appellate jurisdiction on this court; but the reason for so holding evidently was that, under the provisions of different city charters, such assessments were based primarily upon petitions signed by such abutting property owners, and consequently not predicated upon the fiat of the general assembly, notwithstanding same were levied upon the theory of local benefit conferred upon the property of abutting proprietors. And that is the theory of our opinion in Fayssoux *v.* Denis, 48 La. Ann. 850, 19 South. 760. "The tax," says our opinion, "is levied for the public benefit; the local assessment, for the improvement of the property of the individual; and payment is exacted solely on the theory that he receives the benefit, not participated in by the community, at least to some extent. Taxes are levied, too, solely by virtue of the law conforming to the constitution. No system of local improvements is enforced without some reference to the assent of the owner, for whose advantage the banquette or street paving or other supposed improvement is furnished. It is true, the assent of the majority or other proportion of the owners, fixed by law, is made to bind those who object. But still there is the substitution of the will of the majority for the consent of all, or other similar requirement, to make binding the local assessment. In this respect

Local Assessments and Taxes —Distinction.

City of Shreveport *v.* Prescott

the local assessment differs from the public tax, effective simply and only because the constitution authorizes and the law directs it. Under the city charter, the paving must be petitioned for by property owners; and if, after due publication, it is not opposed by a majority, it is ordered by the council. While, therefore, the local assessment is deemed a 'tax', it is distinguished from the public tax by marked differences. The tax, as usually understood, is levied by the law alone, not for the individual, but for the public, good. The local assessment is enforced by the law, but based on the consent of the owners to the extent required by the statute, and is levied for the advantage, the law presumes, of those on whose property the assessment is imposed." The local assessment under consideration was levied by the city of Shreveport, but by the authority of a legislative enactment which required no consent on the part of property owners residing upon the streets to be paved. In this important particular that statute differs from the provisions of the charter of the city of New Orleans which controlled the decision of the case of Fayssoux *v.* Denis; and in this respect the statute under consideration is very closely assimilated to the statutes governing local assessments for levee purposes. The feature which distinguishes local assessments for public, state purposes, from those for city street improvement, is the assent of the property owner; same being *a sine qua non* to the latter, but not to the former. In State *v.* Judges of Court of Appeals, 46 La. Ann. 1292, 16 South. 219, we had under consideration the legality of a special assessment levied for the benefit of certain lands which were subject to inundation and overflow; and, the respondents having declined to take jurisdiction of an appeal which involved the determination thereof, *mandamus* was applied for to this court to compel them to examine and decide the same. In the course of our opinion we said (the Chief Justice speaking for the court): "We are of the opinion that the cases involve the

Same—Same.

issue of tax and illegal tax, *vel non*, and that that is an issue which has to be passed upon and determined by this court, and not the court of appeals." And then, quoting the eighty-first article of the constitution, the opinion proceeds thus, *viz.*: "We are of the opinion that the use of the words 'all cases', and of the words 'any tax, impost or toll whatever', clearly indicates on the part of the framers of the constitution an emphasized intention to give to the terms 'tax,' 'toll,' and 'impost' the widest meaning to which they are susceptible, and to allow every citizen to have submitted to the test of legality and constitutionality by the highest court of the state any charge upon his property imposed by the state or its subordinate political agencies, when claimed to be legally and constitutionally imposed by them in aid of governmental purposes, whether extending over the whole state or over particular localities. * * * The fact that charges imposed by the state or its subordinate agency may differ and vary from each other as to the particular circumstances and conditions under which they may be imposed, and the extent or resulting effect of their imposition, does not prevent, for the purpose of the special question of the jurisdiction of courts in dealing with them, their falling, in an extended sense, under the terms 'tax, toll or impost.' It is for this court, and it alone, finally to determine whether charges imposed upon the property of the citizens are or are not taxes, imposts, or tolls, and, if so, whether they are legally and constitutionally imposed. As cases arise under differing circumstances and under differing pleadings, we will determine whether the particular case falls within our exclusive appellate jurisdiction for decision, or not." In the same case MR. JUSTICE MILLER very strongly emphasized the doctrine which the Chief Justice announced, in a concurring opinion, in the following language, *viz.*: "The jurisdiction of this court under the constitution extends to all cases in which the constitutionality or legality of any tax, toll, or impost whatever is involved. It is manifest the word

Taxation—Jurisdiction—Statute Construed.

'tax,' in this part of the constitution, is used in its largest sense. After the words describing the jurisdiction of this court as extending to all cases involving the legality or constitutionality of any tax, toll, or impost, there is added the word 'whatever'; *i. e.* whatever the character of that tax, toll or impost." This court, having under consideration the same question in Railroad Co. *v.* Sheriff, 47 La. Ann. 708, 17 South. 249, used this language, *viz.*: "The jurisdiction of this court is full and complete. The purport of our opinion in State *v.* Judges of Court of Appeals, 46 La. Ann. 1292, 16 South. 219, was that, notwithstanding forced contributions for levee purposes are treated as local assessments, not subject to the rule of constitutional uniformity applicable to general taxation, they are taxes, under article 81 of the constitution, conferring on this court appellate jurisdiction in all cases involving the constitutionality or legality of any tax, impost, or duty whatsoever." In Tax Collector *v.* Circuit Court of Appeals, 49 La. Ann. 1221, 22 South. 368, we held that the constitutional provision in question "embraces, indeed, the whole scope of remedial legislation pertinent to the subject of taxation." All of the foregoing decisions are entirely consistent, and all of them equally favor the constitutional right of this court to assume appellate jurisdiction of all cases in which is involved any tax, toll, or impost whatever, when same is levied in pursuance of the law alone.

Considering this new departure which has been taken by the legislature, (1) whereby street paving is to be carried on by *ex parte* proceedings inaugurated by municipal authority alone; (2) that, by an ordinance of the municipality ten-fifteenths of the cost thereof is put upon the abutting property owners, without either their knowledge or consent, and, as defendants insist, in violation of the enabling statute; (3) that, by ordinance, also, the remaining five-fifteenths of the cost is to be apportioned between the city and certain street-railroad corporations, in like violation of said statute; and (4) that, while the proportionate shares of the several de-

fendants of said cost are comparatively small, the total amount charged against them and other property owners similarly situated, and whose rights will be necessarily affected by the interpretation which this court shall place upon said ordinance and law, aggregate an amount in excess of $100,000,—the necessity for this court to entertain appellate jurisdiction of this cause becomes strikingly apparent. Viewing our jurisprudence in this light, we are of opinion that we should entertain jurisdiction of this cause; and, being of this opinion, the motion to dismiss the appeal is denied.

Same—Same—Same—Case at Bar.

Memorandum. We have decided this motion to dismiss separately from the merits, and in advance, as it was important in itself, and it was desirable that MONROE, J., should take part in its decision, as a nonarguable question of law; BLANCHARD, J., being recused. As MONROE, J., was not a member of the court when the case was submitted, he prefers not to take part in the decision on the merits. Therefore same will be taken up by the court and disposed of hereafter.

On the Merits.

(May 15, 1899.)

The question for consideration in this court is the validity and legality of the ordinance of the city of Shreveport under which the local assessment for street improvements is sought to be enforced against the defendants in this suit. Having assumed jurisdiction of the matter in controversy, which is below the lower limit of the appellate jurisdiction of this court in amount, the question is one of law alone. Therefore we can deal with no question of evidence that does not appertain strictly thereto.

From the city ordinance in question we make the following extracts, to wit: "Shreveport, May 27th, 1897. Whereas, the city of Shreveport, by ordinance of date January 14, 1897, called for bids to pave with vitrified brick, pursuant to specifications on file in the comptroller's office, Texas street from Commerce to

Paving Streets—Distribution of Cost—Ordinances.

Common streets, Common street from Texas street to Milan, and Texas avenue from Milan street to limit of said avenue; and whereas, due and legal notice by publication was given for calling for bids; and whereas, the lowest bidder was James F. Talbot, of Chicago, Illinois, to do the above-described work with No. 1 Coffeeville vitrified brick, and in accordance with the aforesaid specifications (hereto annexed), at $1.87 per square yard, with brick as per sample submitted; and whereas, the said bid was accepted by the city council on May 6, 1897: Now, in pursuance thereof, the following agreement is hereby entered into between the said city and the said Talbot, contractor: That said contractor, having given satisfactory bond, hereby agrees to pave with the aforesaid No. 1 Coffeeville brick, and pursuant to the aforesaid specifications, except as necessary to be modified by the city," etc. "The price of the aforesaid work complete is hereby fixed at $1.87 per square yard, which the contractor is to receive as follows: The abutting property holders throughout the whole limit of the streets and avenue paved are to pay two-thirds of the same area at the rate of $1.87 per square yard, each one paying in proportion to frontage, according to section 3, Act No. 10, of the Statutes of Louisiana for 1896, and the Shreveport City Railroad and the Shreveport Belt-Railroad Companies are to pay (each one) in proportion to the space occupied by its roadbed, compared to the entire width of the street, and under its contract with the city of Shreveport, hereby fixed at 12 feet from the corner of Spring and Texas streets throughout the length of aforementioned streets and avenues, besides its *pro rata* due for paving intersections, pursuant to section 2 of the aforesaid act, and in accordauce with its contract with the city. The balance of the cost of paving shall be paid by the city of Shreveport, and, in order to pay therefor, all funds on hand arising from bridge collections, and that may accrue from such source pending this work, and not otherwise appropriated, are hereby set apart and appropriated by the city; also any other moneys on hand, or that

may accrue during this work, and not otherwise appropriated to alimony and fixed charges; also the eight notes of the St. Louis & Southwestern Railway Company for $500 each, due, respectively, August 23, 1898, and at intervals of one year thereafter," etc. "It is further understood and agreed that for all work on Texas street the amounts due by abutting proprietors under Act No. 10 of 1896 shall be paid for in cash on the acceptance of the work; but for the portion due by the Shreveport City Railway Company throughout the length of its track in the city of Shreveport, and the portion due by the Shreveport Belt-Railroad Company, only twenty per cent. shall be demandable in cash, and the balance to be paid in equal installments of one, two, three, four, and five years, as provided for in section 4 of Act No. 10 of 1896; and the proportion of cost of paving chargeable to abutting owners of Common street and Texas avenue shall be on the same basis,—that is, twenty per cent. cash, and the balance in one, two, three, four, and five years," etc. "The said city obligates itself to pass proper ordinances levying assessments on the realty and the railroads aforesaid, according to Act No. 10 of 1896, and hereby transfers to and subrogates said Talbot to all the rights and interest in the assessments already resting on said realty and railroads and to be made hereafter, with all privileges accruing on same, and agrees to transfer to him the aforesaid certificates, all of which transfers and subrogations are accepted by the said cortractor in full settlement and payment of the portion of the costs of paving chargeable under the law to said railroads and abutting proprietors," etc. From the foregoing provisions of the ordinance it clearly appears that the abutting property holders have been assessed for two-thirds of the entire cost of the street improvement, according to the frontages of their respective properties; that the street-railroad companies have been assessed according to the space occupied by their roadbeds, compared to the entire width of the street; and that the residue of the expense is charged to the city, and payable

from its general revenues. The defendants deny the legality of the ordinance, and insist that it does not conform to the terms of the law; and they contend that the exaction demanded of them is illegal, and cannot be enforced. The contention of the defendants is that: "The statute in question authorizes the city to pave the streets, and directs that the cost of such improvement shall be borne in the proportion of two-thirds by the property holders on the street, and one-third by the city. Where a street-railway occupies a part of the street, the law declares it shall pay in proportion to the space it occupies, compared to the width of the street. No word of authorization appears anywhere, directly or indirectly, expressly or by reasonable implication, that what the railway pays the city is entitled to credit on its one-third of the expense. To permit the city to do this would be to reduce the amount the city has to pay for such improvement to about one-fifth or one-sixth of the total expense, whereas the law declares it must pay one-third of the cost. * * * The law is susceptible of two constructions only, both of which the city council has disregarded. One is that two-thirds of the entire cost of paving a given block on Texas street is to be borne by the property taxpayers and the street railway, and one-third by the city. The other construction of which the act is susceptible is based on section 2, and is as follows, to wit: 'Find the total cost of paving a block. Then ascertain what the railway owes in proportion to the space of the street it occupies. Deduct this sum from the total expense, and the remainder is to be borne by the abutting property owners and the city in the proportion of two-thirds by the former and one-third by the latter.' " The terms of the statute are as follows: "That the municipal authorities * * * shall have the power to pave, plank, gravel, macadamize, or otherwise improve the streets and alleys, or any part thereof not less than one block, within the corporate limits, and shall have power to levee and collect special taxes or local assessments on the real estate abutting the street or alley to be improved

for the purpose of defraying a part of the cost of such work or improvement." Section 1, Act No. 10 of 1896. It further provides: "That the owners of real estate so abutting shall pay two-thirds of the entire cost of such work or improvement, and the corporation shall pay one-third from its general resources, provided, that where a railway bed or track occupies a portion of the street, it shall pay in proportion to the space occupied by its roadbed, compared with the entire width of the street." Section 2, *Id.* It further provides: "And after the contract has been awarded, the council shall provide by ordinance for an assessment of all real estate abutting the street or the alley, and on railroad tracks as aforesaid, a portion whereof is to be paved or otherwise improved, in such manner as to apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting, and on the railroad track, in the proportion as set forth in section 2 thereof." Section 3, *Id.*

The question of the validity of the city ordinance must depend principally upon the construction to be placed on the provisions of the second section of the statute; and that depends upon the effect to be given to the part of the sentence which follows the word, "provided," and which is as follows, to wit: "That where a railway bed and track occupies a portion of the street, it shall pay in proportion to the space occupied by its roadbed, compared to the entire width of the street." If that proviso was intended by the general assembly to relate to the entire portion of the section preceding it, there is great force in the contention of the defendants, as it leads to the supposition that the portion of the cost that the railway is to pay is to be deducted from the entire cost of the improvement; thus leaving the residue to be apportioned between the city and the abutting property owners, as indicated in the said preceding part of the section. The language of the proviso in section 3, to wit, that, "after the contract has been awarded, the council shall provide by ordinance for an assessment for all real estate abutting the streets or alley, and on railroad tracks as aforesaid, a portion

thereof to be paved or otherwise improved in such manner as to apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting and on the railroad track in proportion, as set forth in section 2 thereof," seems rather to strengthen the aforesaid conclusion than otherwise, as it declares that the city "is to apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting, and on the railroad track, in the proportion as set forth in section 2." The district judge entertained a different view of the statute, and maintained the legality of the ordinance. We have made the following extracts from his opinion, as illustrating his reasons for judgment, as follows, to wit: "The cost of the work so far has been paid as follows: Two-thirds by the abutting real estate, and one-third by the railway companies and the city, the company paying a proportion of the entire cost, based on the space occupied by the tracks, estimated at nine and five-twelfths feet, compared to the entire width of the street, and the city paying the remainder. For the sake of illustration, assuming the paving of a block in length of the street costs $5,000, and that the tracks of the railway company occupy one-fifth of the width of the street, the city contends that the real estate abutting owes two-thirds of $5,000 (that is, $3,333.33⅓), and the railway company owes one-fifth of $5,000 (that is, $1,000); leaving a balance of $666.66⅔ to be paid by the city. Defendants contend that the real estate abutting and the railroad company are to pay two-thirds of the entire cost (that is, $3,333.33⅓), and the city the other one-third (that is, $1,666.66⅔). Under this theory the railroad is charged with one-fifth of two-thirds, and the real estate with four-fifths of two-thirds. Defendants further contend that the only other interpretation admissible is, first, to charge the railroad with one-fifth of the entire cost,—that is, $1,000,—and then apportion the remainder on the basis of two-thirds to the abutting owners and one-third to the city. Under this contention the $5,000 would be apportioned as follows: Railroad, $1,000; city, $1,333.33⅓; and real

estate, $2,666.66⅔. The result to the real estate is the same in both cases. * * * The solution of the question before the court hinges on the interpretation or construction of Act No. 10 of 1896, and more especially on sections 2 and 3." The judge then quotes the language of sections 2 and 3, and refers to Act No. 127 of 1890 as the foundation of the act of 1896. In aid of the construction he has placed upon the latter act, he says: "The act of 1896 goes beyond this provision of the act of 1890, and imposes a local assessment also on railroads occupying a portion of the street. The general rule is the same in both acts, and under the act of 1896 it is admitted that all real estate abutting on streets, and not occupied by railroad tracks, is subjected to an assessment of two-thirds of the entire cost. The constructions contended for by defendants lead to the conclusion that the legislative intent was to discriminate in favor of real estate abutting on a street occupied in part by a railroad. They argue that such is the literal meaning of the concluding part of section 3, and that the court should not depart from the letter under the pretense of pursuing its spirit. * * * Act No. 10 of 1896 is a general paving statute, applicable to every street and alley in the city of Shreveport, and in all other cities of the same class. The act formulates the general rule that abutters shall pay two-thirds and the corporation one-third of the entire cost of the improvement. By a proviso in section 2, local assessments are also imposed on railroads, by the force of which they are subjected to the burden of paying a proportion of the cost of paving the entire street, including intersections. Section 3 provides for the assessment of both real estate as aforesaid, and for the entire street, including intersections. The legislative intent was that railroads shall be so assessed in the proportion fixed in section 2. Now, a literal interpretation of the concluding part of section 3 provides only for the apportionment of two-thirds of the contract cost or price of the work between the blocks, leaving out the intersections, and charges the railroad not with its proportion of the whole cost, as fixed

by section 2 (a proportion of two-thirds of the whole cost). * * * The literal construction would destroy uniformity, and create two classes of abutters; one class paying two-thirds, and the other class less than two-thirds, of the cost, while enjoying equal benefits. Local assessments are a species of taxes on supposed benefits, measured, in this instance, by the frontage of real estate abutting on Texas street. * * * It is my opinion that the context of the act, its intent, and all the presumptions of law are against the construction that leads to the conclusion that an unreasonable discrimination has been embodied in the concluding part of section 3 in the act of 1896. If the intent was to place all abutting real estate on the same footing, then it is clear that the literal construction which contravenes this intent should not be sustained. Section 3 should be construed so as to make the provisions of section 2 effective, and so as to place all owners of real estate abutting on the street on the same plane of equality. Such a construction will harmonize all the provisions of the act, and carry into effect the legislative intent. The city is not a taxpayer. No local assessments are levied against her, and she is primarily bound for the whole contract price under the charter of 1876 and 1898. The city is but the recipient of the proceeds of local assessments. It must make up the deficit out of her general revenues. The argument that the city does not pay one-third, and may, in certain contingencies, pay nothing, cannot affect the question of the liability of the taxpayer for his proportion as fixed by law, so long as the total taxation does not exceed the cost of the work." As a summary of this entire argument, the judge makes this statement: "If it be the intent of the law that the abutter shall pay two-thirds of the cost and the railroad another portion, then it follows that the city shall pay less than one-third; and this is the result of defendants' second position."

Recurring to the proposition set out in the beginning, we are to consider the simple question of the legality of the city

ordinance, and not the constitutionality of the statute, which is not at issue in the case. The entire discussion proceeds upon the theory that the act of the legislature was a constitutional exercise of power, notwithstanding it makes no provision for the property owner to be consulted. If we understand the theory of the district judge, it is that the contention of the city should be sustained, and the legality of the ordinance recognized, because in that way only all abutters upon different streets would be assessed in the same proportion. In our view, the test of the ordinance is this: The intention of the legislature in requiring street railroads to pay a portion of the cost of street improvement is the question to be determined. Hitherto street-railroad companies have not been required so to do. The question arises, therefore, whether the legislative intent was, by charging the railroads a portion of the cost, to relieve the abutters of a portion of the expense or the general taxpayers of the city, one or both. If it was the intention to relieve the general taxpayers, it must necessarily follow that the burden of abutting property owners is increased. In this view there is great force in the contention that the portion of the cost which is charged to the railroad companies should be first deducted, and the residue apportioned between the abutters and the city, as provided in section 3. The recitals of the ordinance are that: "The abutting property holders throughout the whole length of the streets and avenue paved are to pay two-thirds of the said area at the rate of $1.87 per square yard, each one paying in proportion to frontage according to section 3, Act No. 10 of 1896; and the Shreveport City Railroad and Shreveport Belt-Railroad Companies are to pay in proportion to the space occupied by their roadbeds compared to the entire width of the street, and under its contract with the city of Shreveport, hereby fixed at 12 feet from corner of Spring and Texas streets, throughout the length of the aforementioned streets and avenues," etc. "The balance of the cost of paving shall be paid for by the city of Shreveport," etc. The sense of this ordinance is

that the abutting property holders are required to pay two-thirds of the entire area, each one paying in proportion to frontage. The city railroad companies are required to pay in proportion to the space occupied by their roadbeds compared with the entire width of the streets occupied by them, and the city is to pay the balance of the cost. Section 3 of Act No. 10 of 1896 provides that the council shall "apportion two-thirds of the contract price on the basis of the respective frontage of the real estate so abutting, and on the railroad track in the proportion as set forth in section 2 hereof." Referring to the provisions of section 2 we find the following, *viz.*: "That the owners of real estate so abutting, shall pay (two-thirds) ⅔ of the entire cost of such work, or improvement, and the corporation shall pay one-third, out of its general resources, provided that where a railway bed or track occupies a portion of the street, it shall pay in proportion to the space occupied by its road-bed compared to the entire width of the street," etc. It is conspicuous (1) that no mention whatever is made of the city's portion of the cost of the street improvement in section 3 of the statute; (2) reference is made to the portions of the cost of the abutters and of the railroad companies, but the statement is qualified by a reference to the provisions of section 2, *supra*. Hence our conclusion is that the provisions of section 3 are not controlling, and that resort must be had to the more general provisions of section 2, inasmuch as they state specifically the rates or proportion of each one of the three parties,—the abutters, the city, and the railroad companies. On instituting a comparison between the provisions of the city ordinance and the statute, it becomes apparent that the former has transposed the terms of the latter by stating (1) the share of the abutter to be two-thirds, (2) that of the railroad companies in proportion to the space occupied, and (3) that of the city as the remainder of the cost; whereas the statute states (1) the share of the abutter shall be two-thirds of the entire cost, (2) that of the city one-third, and (3), provided that a street railway occupies a portion of the

street, it shall pay in proportion to said space. In our view, the effect of this transposition is to make a radical alteration in the proportion of the cost of the street improvement. According to the terms of the statute, the abutter is chargeable with two-thirds and the city with one-third; and, in case there is a street railroad operated in a given street, it is to be taxed for the space it occupies, and this amount is to be deducted from the whole cost. By this process the portion that is chargeable against the railroad companies would proportionately diminish the shares of both the abutter and the city, but on the hypothesis of the ordinance the abutter is held bound for two-thirds at all events, and the amount taxed against the railroad companies would only diminish the share of the city. If this theory is maintained, the alteration of the law so as to compel street-railroad corporations to pay a portion of the cost of street improvement would benefit the general taxpayers of the city, to the detriment of abutting property holders, whose property is alone charged with a lien. It cannot be readily believed that such was the intention of the general assembly in enacting the statute; on the contrary, we are of opinion that they expressed an opposite intention.

But the argument of our learned Brother of the district court is that such a construction as this placed upon the statute would render it obnoxious on the ground of inequality, in that abutting property holders upon streets upon which street railroads are operated would have to pay less, proportionally, than abutting property holders upon streets upon which no street railroads are operated would have to pay (suggesting the unconstitutionality of the law), and that, as the general rule of statutory construction which obtains is that courts of justice should rather lean towards that interpretation which would relieve it of the objection of unconstitutionality than to one that would not, he has selected the latter. Or, in other words, to save the law, his judgment sanctions an interpretation of the city ordinance which is contrary to its letter, and most injuriously affects the interests

of the abutting property owners on streets upon which street railroads are operated. But is there such an inequality as the district judge suggests on the theory presented? Are there not two distinct and different classes of abutting property holders: (1) Those upon streets upon which street railroads are operated, and (2) those upon which no street railroads are operated? Possessing dissimilar conditions, why should they not be dissimilarly treated? And, if the street-railroad corporations are required to pay a portion of the cost of the pavement of the streets upon which they are operated, and that amount is first deducted from the total cost of the work, does not the amount they pay have the effect of diminishing the amount the city has to pay, and thus benefit all the taxpayers of the city, all abutting property owners included? We think this is self-evident. We had recently occasion to examine and decide adversely a similar charge of unconstitutionality of a statute in State *v.* American Sugar-Refining Co., 51 La. Ann. 562, 25 South. 447. In Improvement Co. *v.* Jollisaint (No. 12,988; recently decided) 25 South. 477, we had under consideration a question of a special assessment for street paving in the city of New Orleans, and in the course of our opinion held that the city council could enforce collection from the front proprietors of lots abutting on the street,—a local assessment in proportion to the frontage,—and said: "In quite a number of cases this court has held that local municipal assessments for local improvements are valid, although the organic law provides that all taxation shall be equal and uniform; and the reason for that rule is that such assessments are not taxation within the meaning of the constitution. Yeatman *v.* Crandall, 11 La. Ann. 220; *In re* New Orleans Drainage Co., 11 La. Ann. 371; Wallace *v.* Shelton, 14 La. Ann. 498; O'Leary *v.* Sloo, 7 La. Ann. 25; Municipality *v.* Guillotte, 14 La. Ann. 297; Dill. Mun. Corp. §§ 617, 619; Cooley, Tax'n p. 117; *Id.* p. 416 *et seq.*; Charnock *v.* Levee-Dist. Co., 38 La. Ann. 323; Manufacturing Co. *v.* Green, 39 La. Ann. 461, 1 South. 873. We think it unnecessary to analyze those decisions, inasmuch as the principles therein

announced have been so generally accepted and acted upon by this court in many more recent decisions that they may be accepted as in some respects axiomatic in its jurisprudence. The following cases may be appropriately cited in support of that proposition, *viz.*: State *v.* Judges of Court of Appeals, 46 La. Ann. 1293, 16 South. 219; Railroad Co. *v.* Sheriff, 47 La. Ann. 708, 17 South. 249; Fayssoux *v.* Denis, 48 La. Ann. 850, 19 South. 760; Tax Collector *v.* Circuit Court of Appeals, 49 La. Ann. 1221, 22 South. 368." In the case of Trust Co. *v.* Smart, 51 La. Ann. 416, 25 South. 443, this court said: "The constitutional question sought to be raised by the police jury is without foundation in law or jurisprudence. Constitutional provisions to the effect that all taxation shall be equal and uniform apply only to general taxation, and have no application to local assessments. The provision of the constitution that 'taxation shall be equal and uniform throughout the state' does not apply to or preclude local assessments or special taxes levied in pursuance of special provisions of law in aid of public improvements. Municipality *v.* Dunn, 10 La. Ann. 57; City of New Orleans *v.* Elliot, 10 La. Ann. 59; Yeatman *v.* Crandall, 11 La. Ann. 220; *In re* New Orleans Drainage Co., 10 La. Ann. 338; State *v.* New Orleans, 15 La. Ann. 354." The opinions makes the following quotation from a Massachusetts case: "It is only when statutes impose taxes on false and unjust principles, or which operate to produce gross inequality, that courts can declare them void." "The words of the constitution, 'taxation shall be equal and uniform,' refer to general taxes to defray the ordinary expenses of the state and its subordinate local governments, and not to assessments for local improvements. Local assessments are not taxation, within the meaning of the constitution, requiring uniformity of taxation." *In re* City of New Orleans, 20 La. Ann. 497; *In re* New Orleans Drainage Co., 11 La. Ann. 370; Wallace *v.* Shelton, 14 La. Ann. 498; Charnock *v.* Levee-Dist. Co., 38 La. Ann. 323; Manufacturing Co. *v.* Green, 39 La. Ann. 461, 1 South. 873; Paving Co. *v.* Gogreve, 41 La. Ann. 251, 5

South. 848; Hill *v.* Sheriff, 46 La. Ann. 1566, 16 South. 475; State *v.* Judges of Court of Appeals, 46 La. Ann. 1302, 16 South. 219; Fayssoux *v.* Denis, 48 La. Ann. 850, 19 South. 760; Cooley, Tax'n p. 116. Similar opinions have found expression in the courts of other states, of which the following is an illustration, *viz.*: In Gosnell *v.* City of Louisville, 46 S. W. 722, the Kentucky court held that "local assessment upon the property benefited for the cost of a street improvement is not a tax, within the meaning of the provisions of the constitution limiting the tax rate of cities, and requiring equality and uniformity of taxation." Again: "The distinction between a tax and a local assessment has been uniformly recognized by the courts of this state, and, while the latter is, in one sense, a tax, being the imposition of a burden upon the citizens, and an involuntary charge upon his property, it is not a tax in the sense contemplated by the framers of the constitution in the section referred to." In Express Co. *v.* Seibert, 142 U. S. 339, 12 Sup. Ct. 250, the supreme court expressed the following view on a parallel subject, *viz.*: "They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes. There can be no objection, therefore, to the discrimination made, as between express companies defined by the act and other companies or persons incidentally doing a similar business by different means and methods, in the manner in which they are taxed." But the following argument of defendants' counsel has attracted our attention, to wit: "That the city's interpretation of the statute is erroneous is demonstrated by the condition on Common street. As shown heretofore, several hundred feet of this street is included in the paving contract. Common street is a narrow street. The two tracks of the street railway take up so much of the street that, after the abutting property is made to pay (under the city's contention) two-thirds of the entire cost of paving, what the railway will be called upon to pay in proportion to the space it occupies compared to the

width of the street would more than pay the remainder of the cost, and thus the city would be let out of paying anything at all on the cost of the pavement, but might actually find itself in the position of retaining, as revenue, a surplus; in other words, paying nothing itself, and actually collecting from the property holders and the railway enough to leave it (the city) a balance after settling with the contractor. And yet the law provides that a third of the cost is to be borne by the city." According to the foregoing hypothesis, a greater hardship would be placed upon the abutting property holders on those streets upon which street railroads are operated than the judge *a quo* suggests with regard to abutting property holders on those streets where no street railroads are operated, in that the city would be relieved altogether, and the general taxpayer as well, while the abutters on the streets first named would remain absolutely bound for two-thirds of the cost at all events. Consequently, the suggested unconstitutional effect of a literal interpretation of the act in question would not result, in our opinion.

With regard to the proper interpretation of that act we have collated the following authorities: The general principle applicable to the exercise of municipal authority in levying a special street assessment is thus stated by an author of recognized authority, *viz.*: "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. The authority to municipalities to impose burdens of any character upon persons or property is solely statutory, and, as its exercise may result in a divestiture and transfer of property, it must be clearly given and strictly pursued." Dill. Mun. Corp. §§ 605, 610. Upon the proposition that statutes which are in derogation of common right are to be construed strictly, the author of a recent treatise has this to say: "It is a well-settled rule that statutes which are in derogation of common right, and which confer special privileges, or impose special burdens or

restrictions, upon individuals or upon one class of the community, not shared by others, should receive a strict construction; and the courts will require that cases coming before them shall be brought clearly within the terms of such statutes before they will be held applicable thereto. But a statute cannot be said to be in derogation of common right, unless it is confined in its operations to a particular individual or set of men, separate and apart from the rest of the community." Black, Interp. Law, p. 300, § 115; Rothgerber *v.* Dupuy, 64 Ill. 452; Steamboat Co. *v.* Foster, 5 Ga. 194. The author makes the further statement, which particularly bears upon the instant case, to wit: "It is also said that an act authorizing an assessment for a street improvement is in derogation of individual rights, and must be strictly construed and rigorously observed. If there is a failure to comply with any material requirement of the statute, a sale of property for nonpayment of the assessment, or a lease based upon such a sale, will be invalid to convey either the title or the right of possession." Black, Interp. Law, p. 301, § 115,—citing Hopkins *v.* Mason, 61 Barb. 469. The same author further says: "In this connection, it may also be stated that it is regarded as a settled principle of law that, where there is a fair and reasonable doubt as to the existence of a power in such corporation, the courts will not uphold or enforce its execution. For example, statutes or charters delegating the power of taxation to municipal corporations will be strictly construed, and such delegation should be made in clear and unambiguous terms, and the grant will not be extended by implication or inference. The reason is that the power of taxation, being a sovereign power, can be exercised by the legislature only when and as conferred by the constitution, and by municipal corporations only when unequivocally delegated to them by the legislative body. The character of a municipality, in respect to the powers of taxation which it grants, will not, therefore, receive a liberal or expansive interpretation, and the municipality will not have authority to lay any other taxes, or to

tax any other property, or to impose taxes for any other purpose, than as its charter or the general laws of the state relating to municipal corporations expressly, or by necessary implication, allow. The grant to a municipal corporation of the power to provide for the levy and collection of special taxes for the improvement of streets and alleys upon real estate adjacent to such improvements does not include the power to provide for the sale and conveyance of such real estate in case of nonpayment." Black, Inter. Law, p. 317, § 119,—citing Paine *v.* Spratley, 5 Kan. 525; Ottawa *v.* Carey, 108 U. S. 110, 2 Sup. Ct. 361; Cooley, Const. Lim. 192, 194; Black, Const. Law, p. 381. The same author further says that, "where a strict construction is appropriate, the courts, standing upon the letter of the statute, will accept it as they find it, and will not undertake to amend or reform the language which the legislature has seen fit to employ. They will not put a forced or strained interpretation upon the words of the law in order to avoid penal consequences, but neither will they correct grammatical errors, wrest the words from their usual signification, in search of a supposed legislative intent, nor supply apparent omissions or oversights." Black, Interp. Law, p. 282, § 113. The same author further says: "But, in the construction both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words employed; and, if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and, when the words have a definite and precise meaning, to go elsewhere in search of conjecture, in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without referring to subtle and forced construction for the purpose of either limiting or extending their operation." *Id.* p. 37, § 27.

City of Shreveport *v.* Prescott

In Storrie *v.* Railway Co. (Tex. Sup.) 46 S. W. 796, the Texas court had under consideration and interpreted a provision of a charter of the defendant which provided for the payment of the cost of a street improvement, by making a charge against abutting property owners and a street-railway company, the latter being made liable for cost of paving between the rails and for six inches on each side of the track; and the court, in the course of their opinion, quoted the following provisions of the charter, to wit: "Such company is liable for paving to the extent stated, notwithstanding a resolution of the city council providing that the cost of the improvements shall be wholly defrayed by the abutters;" and, also, the following from the charter, to wit: "The portion of a street occupied by any railroad or street-railway company shall be deemed to mean all that portion of the same between the rails of all tracks laid, and extending six inches beyond the outer edge of the rails of such road, and including the space between the double tracks and between the main track, side tracks, or turnouts;" and then said: "Construing the language of the resolution and that of section 23 of the charter just quoted together, it means that the street-railway company should pay for all the pavement upon such streets lying between the rails of its tracks and between its different tracks, side tracks, and turnouts, and that the remainder should be paid for by the owner of the property abutting upon the said streets on each side. * * * The city council had no authority to make a contract by which the abutting property owners would be charged with the cost of paving the entire surface of the street when it was occupied in part by a street railway, and it will be presumed that the language used was intended to bind the parties in accordance with the terms of the law." In City of Philadelphia *v.* Spring Garden Farmers' Market Co. (Pa. Sup.) 29 Atl. 286, it was held that, when a statute makes a railroad company primarily liable for paving, repairing, or repaving a street on which its tracks are laid, the abutting owners cannot be called on till that liability is exhausted.

In the case of State *v.* Common Council of Michigan City (Ind. Sup.) 37 N. E. 1041, the Indiana court, in construing a statute and ordinance somewhat similar to the one under examination in the instant case, made this statement, *viz.*: "The improvement in question could only be made on the order of the common council. The assessment for its cost can be directed only against the specific property designated in the ordinance. This being so, the assessment for the cost between the rails of the street railway cannot attach to the abutting property, when the ordinance directs that it shall be levied against the property of the company, and the contractor is sent to it for his pay. We are of the opinion that the cost of the pavement between the rails should be borne by the company, and not by the abutting property." In City of Chicago *v.* Baer, 41 Ill. 306, a somewhat similar case is stated, and the court announced this principle, to wit: "A street-railway company occupying a portion of a street with their track and in the use thereof, under a charter and a contract with the city authorities, have a franchise and right of occupancy which is a property of a character to be substantially benefited by the paving of such street, and in proportion as it is thus benefited it should contribute its share to the cost of the improvement, in common with the other property of the street." In Lightner *v.* City of Peoria (Ill. Sup.) 37 N. E. 69, the Illinois court said: "That the right of way of the railways in the street proposed to be improved is contiguous property, and falls within the designation of property that may be specially taxed, was held in Kuehner *v.* City of Freeport, 143 Ill. 92, 32 N. E. 372. In this case it may fairly be presumed that street railways were required to pave their right of way. The exclusion of such rights of way from the pavement to be paid for by the special taxation of contiguous lots, blocks, and tracts of land has been so frequently held not to invalidate the ordinance that it can no longer be considered an open question." In City of Chicago *v.* Cummings (Ill. Sup.) 33 N. E. 34, the Illinois court said:

"It thus appears that the railway company was relieved of paying any portion of the cost of said improvement, and the whole thereof assessed against adjacent property owners, or to the city, to be paid from its general revenues. If the ordinance providing that the railway company shall grade, pave, and keep in repair the portion of the street occupied by it is valid, then only so much of the cost of grading, curbing, and paving of the street, outside of the 16 feet occupied by the railway, should have been assessed against the property benefited, or required to be paid by general taxation." Again: "As already seen, the ordinance requires paving of the street its entire width, and the commissioners report that they have made an estimate of the cost of such improvement. It is manifest, therefore, that the cost of paving the entire 16 feet of the street was wrongfully included in the estimate of the cost of the improvement to be charged upon the property benefited; and the court correctly ruled in denying judgment of confirmation of the assessment roll for that reason." The opinion further states that the city ordinance properly required the improvement of the entire street. "But, the city having required the railway company 'to fill, grade, pave, and keep in repair, during all the time' * * *," the 16 feet of space its double tracks occupied, and required "the same to be done by the railway company with like material, in like manner, and at the time as is required in respect of the rest of the street, the cost of paving so much of said street should have been excluded from the estimate. * * * There is no evidence tending to show that the expense of paving the 16 feet would not be a fair and adequate apportionment of cost, according to benefits accruing to the property of the railway in the street by the improvement. Or, in other words, it does not appear that the benefits to the railway property would exceed the cost of paving said 16 feet. If it would not, and the railway company was required to pave that portion, it is clear that no additional burden would be cast upon the property benefited by requiring it

to bear the cost, so far as benefited, of the residue of the improvement."

In Washington & G. R. Co. *v.* District of Columbia, 108 U. S. 522, 2 Sup. Ct. 865, the supreme court said: "Nothing can be more just than that the company should pay for the work which its track alone makes necessary. * * * The language of congress on that subject would seem to admit of no other construction. The third section of the act already cited says: 'The Washington and Georgetown Railroad Company shall bear all the expense for that portion of the work lying between the exterior rails of the tracks of the road, and for a distance of two feet from and exterior to the track on each side thereof, and of keeping the same in repair.' So far from relieving the company of the duty which it accepted by its charter, the language re-enforces that obligation, and makes its application to the repavement clear. The statute goes on to prescribe what the United States shall pay, and what the District of Columbia shall pay, and what individual owners shall pay; and the proportions in which these parties are to be charged have no relation to the part to be paid by the railroad company, which is in no case a proportionate part of the street along which it runs, but all the expense of the work inside its rails, and for two feet exterior to this on each side." In Gilmore *v.* City of Utica (Sup.) 9 N. Y. Supp. 912, Am. Dig. 1890, p. 2706, § 626, it having been stated that the charter of the city of Utica provided that the common council is authorized to require all railroad companies operating street railroads in any of the streets of the city to repave them between the tracks, and at least two feet in width on each side thereof, whenever deemed necessary, the court said: "Said provision is mandatory, and an assessment levied on abutting owners for the repavement of such portion is illegal and void." In Bacon *v.* Mayor, etc., 12 S. E. 582, the Georgia court said: "The act certainly contemplates that street-railroad companies having tracks running through any street improved should be required to macadamize or

otherwise pave the railway track, and two feet on either side thereof, at their own expense. But this, we apprehend, is chiefly to relieve the municipality and the abutting owners from defraying any portion of the cost incident to this part of street improvement. * * * By showing good cause, an abutting owner may have the right to compel the city council, by *mandamus*, to execute the provisions of the act against street-railroad companies. * * * Certainly the abutting owners cannot be assessed for any part of the cost of such special improvement, whether made or not, and it would seem from the record that no part of such cost has in this instance been so assessed in arriving ultimately at an amount chargeable to abutting owners." In Peake *v.* New Orleans, 139 U. S. 342, 11 Sup. Ct. 541, it was held that, when local improvement in a municipality is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong upon the part of the corporation, neither justice nor equity will tolerate that it be charged as debtor therefor. Byrne *v.* Parish of East Carroll, 45 La. Ann. 392, 12 South. 521, is to the same effect. To the same effect is Gosnell *v.* City of Louisville (Ky.) 46 S. W. 722. In the city of Chicago *v.* Baer, 41 Ill. 306, it was held that neither a city ordinance nor an act of the legislature can confer upon a city the power to make a valid contract with the owner of any interest in property which should contribute towards the expense of such improvement which shall have the effect to exempt him from his portion of the burden.

Same—Same—Liability of Street Railway Company.

The foregoing consensus of judicial opinion affirms the principle that the right of occupancy of a portion of the streets of a municipality by a street-railway corporation is property which is benefited by a street improvement to the extent of the space occupied by its roadbed and tracks, which renders same liable for its proportionate share of its cost just as the property of abutting property owners is liable; that the railway company using the streets for the operation of

its cars is in duty bound to pay for the work on the streets which its track alone makes necessary,—that is to say, all expense for that portion of the work lying between the exterior rails of the tracks of the road and for a distance of two feet from and exterior to the track on each side thereof; that in no case can any portion of the cost of such improvement be attributed to, or assessed against, the abutting property owners; that, when a statute or municipal ordinance makes provision for the assessment of a street-railway corporation for the pavement of such space as its tracks and roadbed occupy, such provision is mandatory, and any portion thereof which is put upon abutting property owners is illegal and void; that the very object and aim of such statutes are to relieve the municipality and abutting owners from defraying any portion of the cost incident to this part of street improvement. The aforesaid adjudications re-enforce and emphasize the quotations we have extracted from the treatises of text writers with regard to the propriety —aye, urgency if you will—for the strictest interpretation of such statutes, and, in our opinion, fully justify the construction we have given the provisions of section 2 of Act No. 10 of 1896. And this is particularly true of this statute, for the reason that it is the fiat of the general assembly, which confers upon municipalities plenary power, upon their own motion, and without consulting the wishes of abutting property owners, to contract for unlimited street improvement at their cost.

Same—Same—Abutters Not Liable for Cost of Paving Track.

Same—Same—Same.

Same—Same—Same.

The remaining feature of the ordinance under consideration which remains to be considered relates to the quantity of space that is occupied by the street railways that are enumerated therein. We make the following extract from the defendant's answer, *viz.*: "The respondents further aver that the two tracks of the street-railway companies on the streets named occupy from 15½ feet to 22 feet, and that the company is chargeable

Same—Same—Space Occupied by Track.

in law for the cost of the paving and improvement, in proportion to the space the tracks occupy, to the width of the street; yet they show that the city council of Shreveport, by ordinance, has reduced, or attempted to reduce, the space for which the company must pay to 9¼ feet. They allege that this cannot be done at the expense of abutting property holders of said streets." The judgment was general with reference to all three defendants as abutting property holders, decreeing them to pay the amount of their respective assessments, and recognizing a privilege upon their respective properties as securing same. And, by the rendition of that decree, the judge *a quo* sustained the city ordinance, both in respect to (1) the proportionate share of the whole cost of the street improvement which it puts upon them as abutting property holders; and (2) with regard to the amount of space which it declared the street-railroad corporations actually occupy. It appears to us quite obvious that the question as to the amount of space that is occupied by the street-railway companies is not the proper subject of determination in a municipal ordinance, to which the abutting property owners were not made parties and over which they could not exercise control. This determination was attempted in the instant case, and the exact quantity of space thus occupied was arbitrarily fixed in the ordinance; and, what is of greater importance to the abutting property holders, said space was calculated without reference to any other than one single track, whereas it is the contention of the defendants that on some of the streets there were double tracks, which should have been considered in the calculation. The tendency of the evidence is to support that proposition; and we are of opinion that the provision of the ordinance which fixes the space thus occupied by the tracks of the street railways should be vacated, and the question left open for determination, contradictorily, by and between the interested parties,—that is to say, the abutting property holders, the street-railway companies and the city,—so that the due proportion of the assessment chargeable against

Note

each may be legally ascertained according to law. Entertaining these views, it is our judgment that the provisions of said city ordinance in respect to the proportionate shares of the cost of the street improvement to be charged to said parties, respectively, and also the space occupied by the railway companies, be decreed null and void, as not in conformity to the provisions of section 2 of Act No. 10 of 1896, and that the decree appealed from be annulled and reversed, and one entered sustaining the demands of the defendants. It is therefore ordered and decreed that the city ordinance drawn in question be annulled and avoided in the respects enumerated, and that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the defendants' demands be sustained and enforced at the cost of the plaintiff in both courts. It is finally ordered and decreed that the right of the city is reserved to readjust its ordinance in such manner as to conform to the law and the views herein expressed.

Same—Same—Ordinance Conflicting with Statute.

NOTE.

Validity of Assessment on Abutting Owner as Affected by Failure to Assess Street Railway Company.—An ordinance of a city authorized it to assess two-thirds of the cost of paving a street upon the property holders who were especially benefited thereby, after deducting the amount required of a street-railway company. The city paved only the middle portion of a street, not including the portion where the track was laid, and only assessed the property owners five-eighths of the required two-thirds, and did not assess the street-car company at all. *Held*, that the property owners, under the circumstances, could not complain that the company was not assessed. Bowditch *v.* New Haven, 40 Conn. 503.

It is no objection to the validity of a city ordinance authorizing the repaving of a street, the cost of which is to be assessed upon the owners of the property binding thereon, that it does not provide that a passenger-railway company, which is required by its charter to keep its track and two feet on each side in thorough repair, should be assessed for its proportion of the cost of repaving such street,

on which its tracks are laid. Mayor, etc., of Baltimore *v.* Scharf. 10 Am. & Eng. R. Cas. 241, 54 Md. 499.

Where a street-car company is required to pave and keep in repair a certain portion of a street, a failure of the city authorities to assess the company therefor is such error as will enable a property owner, whose assessment is thereby increased, to have the assessment set aside. *In re* Appleby, 26 Hun (N. Y.) 427.

In Gilmore *v.* Utica, 43 Am. & Eng. R. Cas. 225, 121 N. Y. 561, 24 N. E. Rep. 1009, 31 N. Y. S. R. 880; *reversing* 55 Hun 514, 29 N. Y. S. R. 781, 9 N. Y. Supp. 912, it was held that even if a company be under obligation, by the statute under which it is organized, to repave the streets between its tracks, and therefore ought to bear some portion of the expense of a pavement ordered by the city, the failure of the city to enforce the liability of the company does not render illegal an assessment imposing two-thirds of the expense upon the abutting property owners and one-third upon the city.

CITY ST. IMP. CO.

v.

BABCOCK.

(*Supreme Court of California, Dec. 30, 1898.*)

Authority to Order Improvements.—Under the law providing, in substance, that the owners of a majority of the frontage of the property fronting on a proposed street improvement may make an objection to the same, which shall bar for six months any further proceedings in regard to such improvement. *Held*, that such an objection did not merely suspend the exercise of the jurisdiction of the board of supervisors, but made it necessary that the board should again pass a resolution of intention, after the expiration of the six months, in order to acquire jurisdiction to command the performance of the work.

APPEAL by plaintiff from superior court, city and county of San Francisco. *Affirmed.*

J. C. Bates, for appellant.

Geo. D. Collins, for respondent.

City St. Imp. Co. *v.* Babcock

HARRISON, J. Action upon a street assessment. The proceedings for the work covered by the assessment were taken under the street-improvement act as amended in 1891. Section 3 of the act (St. 1891, p. 196) contained the following provisions: "The owners of a majority of the frontage of the property fronting on said proposed work or improvement, where the same is for one block or more, may make a written objection to the same within ten days after the expiration of the time of the publication and posting of said notices, which objection shall be delivered to the clerk of the city council, who shall endorse thereon the date of its reception by him, and such objection, so delivered and endorsed, shall be a bar for six months to any further proceedings in relation to the doing of said work or making said improvement, unless the owners of the one-half or more of the frontage as aforesaid shall meanwhile petition for the same to be done."

In the present case the board of supervisors passed a resolution of intention to order the work February 26, 1894, and the court finds that within 10 days after the expiration of the time of the publication and posting of the notice of said resolution the owners of a majority of the frontage filed their protest and objection to the doing of said work. Without passing any other resolution of intention, the board of supervisors passed a resolution ordering the work on the 22d day of October, and the work for which the assessment was made was done in pursuance of proceedings taken by virtue of this order. The superior court held that the board had no jurisdiction to order the work, and that the assessment created no lien upon the land of the defendant, and gave judgment in his favor.

It is contended by the appellant that by the passage of the resolution of intention on the 22d of March, and the publication and posting thereof, the board acquired jurisdiction to order the work, and that its subsequent resolution ordering the work was within the jurisdiction thus acquired; that the filing of the protest had the effect to merely suspend the exercise of this jurisdiction for the period of six months;

and that after this period it could order the work the same as if no protest had been filed. Section 3 of the street-improvement act, as it existed prior to the amendment in 1891, contained the following provision immediately after the clause above quoted: "At or after the end of said six months, if said work so barred for six months shall not have been done, the city council may order said work to be done after re-publication and posting of a resolution of intention, by virtue of the proceedings already had and taken, but within like time like objections may again be filed with like effect, and so on at the expiration of each six months until the work is done." And the appellant urges in support of his contention that the omission of this provision in the section, as amended in 1891, indicates that the legislature intended that the work might be ordered without again passing a resolution of intention therefor. We are of the opinion, however, that a contrary inference is to be drawn from the amendment. The provision in the act as it stood prior to the amendment of 1891, that after the expiration of six months the board might order the work to be done "after re-publication and posting of a resolution of intention," clearly shows that under that act it was not necessary to again pass a resolution of intention; that it was sufficient to republish and repost the original resolution of intention; but by the omission of this provision in the amendment of 1891 the legislature intended that such re-publication and reposting should not be sufficient to authorize the board to order the work to be done, but that the matter of the improvement should be again submitted to the legislative discretion and judgment of the board to determine whether, upon further consideration, and in view of the objections that had been made, it was still for the public interest that the improvement should be made, and, if so, that it should be initiated by a new resolution of intention. By filing their protest, the owners of a majority of the frontage placed a veto upon "any further proceedings in relation to the doing of the work," which was absolute for six months, but at the expiration of that period the board could exercise

its power to order the improvement in the same manner, and by the same proceedings, as it could order any other improvement. If it had been the intention of the legislature that the power of the board to order the work was merely suspended for six months, and that at the expiration of that period it might order the work without any other proceedings, it is reasonable to believe that it would have expressed its intention in direct language to that effect; but its use of the term "bar," and its declaration that the board should not take any further proceedings "in relation to the doing of the said work," indicates that it intended more than a suspension of action, and that the further proceeding in relation to the work should be such as were required in the first instance for effecting the improvement. The provision of the section is that the protest shall be not merely a "bar" to ordering the work, but a bar to any further proceedings "in relation to" the doing of the work,—language which must include every step which is necessary to give to the board the power to order the work to be done; and it is further to be noticed that it is not a bar to further proceedings "under said resolution," but further proceedings "in relation to doing said work." The provision for terminating the six-months veto by a petition from the owners of one-half or more of the frontage is to be read in connection with section 4 of the act, which provides that, even though the work be petitioned for by the owners of a majority of the frontage, a resolution of intention must be passed by the board; thus corroborating the conclusion that, after a sufficient protest has been filed, the work cannot be ordered without again passing a resolution of intention therefor.

The construction thus given to the act is further corroborated by the following provision in the same section: "At the expiration of ten days after the expiration of the time of said publication of said street superintendent, and at the expiration of fifteen days after the advertising and posting as aforesaid of any resolution or intention, if no written objection to the work therein described has been delivered as

aforesaid by the owners of a majority of the property liable to be assessed for the expense of said work or improvement, the city council shall be deemed to have acquired jurisdiction to order any work to be done or improvement to be made which is authorized by this act. The declaration that the board shall be deemed to have acquired jurisdiction to order the work, "if no written objection to the work therein described has been delivered," necessarily imports that, if such protest has been filed, jurisdiction shall not be deemed to have been acquired. The judgment and order denying a new trial are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

DU BIGNON

v.

MAYOR, ETC., OF CITY OF BRUNSWICK *et al.*

(*Supreme Court of Georgia, Dec. 21, 1898.*)

Province of Court.—"Ignorance by both parties of a fact does not justify the interference of the court."

Taxation—Executions—Authority of Clerk.—The clerk of the city council of Brunswick has authority to issue executions for municipal taxes due the city on assessments regularly made for previous years, where there has been a failure on the part of the clerk to issue such executions during the years for which the assessments were made.

Charters—Amendments—Retroactive Laws.—The general assembly has the power to amend the charter of a city so as to change its laws touching the advertisement for sale of property for taxes, and such act is not unconstitutional because it applies to taxes due at the time of its passage.

(Syllabus by the Court.)

ERROR by plaintiff from Glynn county superior court. *Affirmed.*

Goodyear & Kay, for plaintiff in error.

Owens Johnson, for defendants in error.

Du Bignon *v.* Mayor, etc., of City of Brunswick

SIMMONS, C. J. 1, 2. Our learned brother in the court below, in refusing an injunction in the present case, rendered a written opinion, giving the reasons why the injunction should not be granted. That opinion so well expresses our views of the law, that we adopt it as our own, except in reference to the question ruled on in the third headnote, with which the judge did not deal. The opinion is as follows: Case Stated.

"Briefly stated, it appears that the Oglethorpe Hotel property, in the city of Brunswick, was by contract released from municipal taxation for the term of seven years, which expired December 31, 1893. The plaintiff, John E. Du Bignon, purchased and became owner of said property in February, 1894. Under the charter of the city of Brunswick, provision is made for the appointment and qualification of three assessors, whose duty it is to assess and value annually all real estate in said city liable for taxation, at a true and just valuation, and to enter their assessment of the same in a book to be kept for that purpose; to return the same to the mayor and aldermen of the city, and file it with the clerk of council of the city, on or before the 1st day of March of each and every year. After said return is made and filed, on or before the 1st day of March in each and every year, every person claiming real estate so assessed shall return his name to the clerk of council of said city, and write the same opposite the property claimed and owned by him. If any assessment shall be deemed erroneous, the owner who may be dissatisfied with any such assessment shall have the privilege of making complaint within twenty days after the date of the report of the assessors; and, upon such complaint being made, the assessment complained of shall be immediately referred to three arbiters, to be chosen as provided, whose award in the matter shall be made within ten days, and shall be conclusive and final. If, on the 1st day of May of any year, there is any real estate in the city which has not been so returned by the owner or claimant thereof, it shall be the duty of the clerk of council to issue an execution

against such real estate which has not been so returned by the owner thereof, as nonreturned property, describing the same, and directed to the marshal of the city, requiring him by levy and sale of the property to make the amount of taxes due on said property for that year. It appears that in the year 1894, and for each year thereafter, including the years 1895, 1896, 1897, and 1898, said Oglethorpe Hotel property was duly and regularly assessed for taxes according to the tax rate fixed for each of said years by the mayor and aldermen of the city; that John E. Du Bignon, the owner thereof, laboring, he claims, under the impression that the term for which said property had been released from taxes had not expired, failed to make return of the same, and to appeal from the valuation fixed by the board of assessors to a board of arbiters, as provided for; and that during said years, up to 1898, the clerk of council, laboring under a like impression, failed to issue executions against said property for the taxes due thereon annually. In 1898 the present mayor and council of the city of Brunswick, ascertaining that said property was in arrears for the taxes due thereon for said years, had the clerk of council to issue executions therefor, and caused the same to be placed in the hands of the marshal for collection, and said property levied on and advertised for sale, whereupon the plaintiff filed his petition as aforesaid, claiming, among other things, that for each of said years said property had been assessed largely in excess of its true and just valuation, and that by reason of a mutual mistake of fact, as claimed, existing both upon his part and that of the mayor and council, as to the term for which the property had been released from taxes having not yet expired, he should be allowed to make return thereof, and appeal to a board of arbitration, with a view of having the value fixed thereon by the assessors reduced, and the taxes to be paid thereon proportionately reduced. And the claim is also made upon the part of the plaintiff that the power to issue executions for back taxes, due in preceding years, is not vested in, and cannot be legally exercised by, the clerk

of council, but that such taxes, due in preceding years, and for which executions were not issued in those years, become debts, the collection of which must be enforced by an action at law.

"There are but two questions arising in this case which I deem it necessary to consider and pass upon, and these are: First, whether the failure of the plaintiff to make his return for said Oglethorpe Hotel property, and enter an appeal from the valuation fixed thereon by the assessors, within the time prescribed, during each of the years aforesaid, was caused by such mistake of fact as would authorize a court of equity to grant the relief prayed for; second, whether the tax executions issued by the clerk of council for the back taxes due on said property in each of the preceding years, as stated, were issued without any power to do so, and therefore illegally issued.

"For the purposes of this case, I deem it wholly immaterial as to whether the contract releasing or exempting said Oglethorpe Hotel property from taxes was legal or illegal, inasmuch as the time for which it was made had expired, and no claim is made for taxes accruing during the period of exemption. It is conceded that easy reference to the contract could at any time have been had by the plaintiff, or by either of said parties. Section 3984 of the Civil Code is in these words: 'If the party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve; nor will the ignorance of a fact, known to the opposite party, justify an interference, if there has been no misplaced confidence, nor misrepresentation, nor other fraudulent act.' And again, in section 3985, it is stated, 'Ignorance by both parties of a fact does not justify the interference of the court.' Under these plain provisions of our Code, it would appear that there had been no such mistake of fact upon the part of the parties as would be relievable in a court of equity. It should be remembered that property owners are limited in each year to a period of twenty

Province of Court.

days, after the date the assessors make their returns, in which to appeal to arbitrators, and, upon failure so to appeal within that period, they are thereafter barred from said right. In the case of Adams *v.* Guerard, 29 Ga. 651, STEPHENS, J., delivering the opinion of the court, said: 'It was said that equity will relieve from a mistake of law as well as from a mistake of fact, and that the statute [of limitations] does not begin to run till the discovery of the mistake. It is too late to deny in this court that there are mistakes of law as well as mistakes of fact which will be relieved in equity, but I apprehend relief was never granted from such a mistake as this. Those mistakes from which relief has been granted were mistakes which occurred in doing something, not in doing nothing; they were mistakes of action, not of mere inaction. When one has contracted or acted on a false assumption of fact or of law, equity may relieve him from the effects of the action, and will not begin to count time against him until the discovery of the mistake; but where he has simply lain still, under a mistaken assumption of either fact or law, without having ever acted at all, it is not a question when time will begin to be counted against his relief, but it is a case where no relief will be granted at any time from the effects of his inaction. * * * Still, the question remains whether it is such a mistake as will put a court of equity in motion. When once in motion, it will relieve, and will count time only from the discovery of the mistake; but it is only a mistake on which there has been action that will put it in motion. Mere inaction, in a case where the statute makes it a bar, is a bar in equity as well as at common law.' Again, in the case of Bohler *v.* Verdery, 92 Ga. 715, 19 S. E. 36, it appears that the defendants in error made returns of their property for state and county taxes for the year 1891 to the tax collector of Richmond county, and that he accepted the same without objection; that afterwards a board of assessors, under an act then in force for Richmond county, assessed the property of the defendants in error, and increased the valuation beyond that given in the returns. Executions for taxes

based on these assessments were issued, and the defendants in error filed their petition to enjoin the tax collector and the sheriff from further proceeding to enforce the executions, upon the ground that the act referred to was unconstitutional. The invalidity of the act was conceded, and was regarded as settled, under the decision in the case of Stewart *v.* Collier, 91 Ga. 117, 17 S. E. 279. It was claimed, however, that the tax collector acted under a mistake of law; that he was dissatisfied with the returns, and, but for his belief that the returns had to be passed upon by a board of assessors under the act in question, he would have insisted upon the appointment of arbitrators according to section 840 of the Political Code. The defendants prayed that the petitioners be required to do equity, and to submit their returns to three disinterested persons, under the provisions of the section referred to, who should fix an assessment upon the property, and that the petitioners be required to pay a tax for the year 1891 upon the assessment so made. MR. JUSTICE SIMMONS, delivering the opinion of the court, said: "The authority of the tax receiver to assess property where a return has been made is derived from section 839 of the Political Code, and is limited to the time prescribed in that section. The language of the section is as follows: "Each return shall be scrutinized carefully by the tax receiver, and if, in his judgment, he shall find the property embraced in the return, or any portion of it, returned below its value, he shall assess the value at once or within thirty days thereafter." The courts cannot enlarge or extend the scope of the statute by granting further time, if the tax receiver fails to act within the time prescribed; nor can they, at his instance, require the taxpayer to submit to an assessment by arbitrators, under section 840 of the Political Code. Certainly the fact that the tax receiver believed, or relied upon the belief of others, that an invalid local statute was valid and superseded the law above referred to, so far as the particular county was concerned, and that his failure to act was due to this cause, could not give the

court any power in the matter. The principles which authorize a court of equity to relieve against mistake have no application to the case. The tax collector is bound to know the law regulating his official duty; and for his error of judgment in reference thereto, no responsibility can attach to the taxpayer. [Authorities cited.] Moreover, mistake implies action, and here there was no action at all.' Then follows citation of authorities, including the case of Adams *v.* Guerard, *supra*, from which quotation is made, with approval, of a part of the decision hereinbefore stated. Clearly, to my mind, under the rulings of our supreme court, this court is powerless, upon this question, to grant any relief to plaintiff.

"Now, upon the other question the principal authority relied upon for plaintiff is the case of D'Antignac *v.* City Council, 31 Ga. 700, wherein JENKINS, J., delivering the opinion, holds that, in proceedings under statute authority whereby a man may be deprived of his property, the statute must be strictly pursued, and compliance with all its prerequisites must be shown, and, speaking of the Augusta ordinance, says: 'Clearly, then, the ordinance contemplates that execution shall issue against defaulters before the expiration of the term of office of the collector within which the default was made, or, in other words, within the same fiscal year (of the corporation) in which the default was made. But by the ordinance the issue of execution must be preceded by a return of the defaulter; ergo such return must be made before the expiration of the collector's term of office,—before the expiration of the fiscal year within which default was made.' And again: 'This construction is strengthened by consideration of the nature of this corporation, and the object for which it assesses taxes. It is a corporation created for municipal government, and it is permitted to assess and collect taxes annually to defray the annual expenses of that government. It should assess no higher taxes than are necessary for that purpose, and, keeping within this rule, there rests upon it both a duty and a

necessity to collect within the year the taxes assessed in and for that year. If we have correctly construed this ordinance, and correctly stated the general law governing *ex parte* summary, statutory proceedings, of which this is one, shall it be said that after ten years of nonaction the defendant in error may cause a demand for taxes to be made, then a return of the taxpayer as a defaulter, then the issue of execution *ex parte* against him, whereby his property may be sold, and his title thereto devested, without a hearing—a day in court —allowed him? We think not. We hold that the defendant in error, by refraining so long from any attempt to enforce payment of these taxes, or to place the taxpayer in the predicament of a defaulter, has lost this summary *ex parte* remedy against him, and must resort to suit at law or in equity, as in other cases between debtor and creditor.' Very much of this should doubtless be considered merely *obiter dicta* upon the part of the learned judge delivering the opinion, for it will be found upon an examination of the case in question that the Augusta ordinance, among other things, provided that 'it shall be the duty of the collector and treasurer to give notice in one or more of the gazettes of the city and to call at least once at the house of each person taxed, to demand the taxes; and unless said taxes be paid within two months from the date of said notice, it shall be his duty to make a return of such defaulters to the city council, and thereupon executions shall issue against the goods or persons of such defaulters.' So that, in each year, before persons or property could be considered as being in default, in order to authorize the issuing of executions against them, these prerequisites had to be complied with, which was not done for ten years, when the city authorities then undertook to comply with said prerequisites, issue the executions, and collect the taxes by levy and sale. The judgment of the court was in these words: 'Whereupon, it is adjudged by the court that the judgment of the court below, dissolving the injunction, be reversed, and the injunction be reinstated, on the ground that the tax executions exhibited with the bill

were illegally issued, the prerequisites of the ordinance authorizing the issue of tax executions not having been complied with.' In the case of Bacon *v.* City of Savannah, 91 Ga. 500, 17 S. E. 749, the case of D'Antignac *v.* City Council, *supra*, is cited in support of the proposition that, 'for a municipality to take the property of a citizen under a power conferred by the legislature to tax by local assessment, it must in all matters of substance follow the power strictly.' While a municipal corporation is permitted to assess and collect taxes annually to defray the annual expenses of the government, as stated by JUDGE JENKINS in D'Antignac *v.* City Council, yet it must be borne in mind that there are many municipalities which are in the condition of Brunswick, as stated in the fifth paragraph of plaintiff's petition, wherein it is averred 'that for a long time past the mayor and council of Brunswick have been more or less in constant need of money, having since 1893 had a large floating debt, and also a bonded indebtedness of $300,000, or other large sum, and being a continuous borrower of money up to the full legal limit which they could borrow without an election, under the constitutional provisions of the state of Georgia,' so that the necessity for the collection of back taxes continually exists. And let it be borne in mind that the only mode provided in the charter of the city of Brunswick for the collection of taxes is by the summary, *ex parte* proceeding of having the clerk of council issue executions, and there is no statute in Georgia affording a common-law remedy for such purpose, as in the case of an ordinary debt; and especially would it be true, where property is not returned, and remains in default, that in such cases there would be no person against whom a proceeding at law could be instituted. In Richards *v.* Commissioners, 40 Neb. 45, 58 N. W. 594, 42 Am. St. Rep. 650, it was held: 'A tax is not a debt capable of enforcement generally by a civil action. If an action is permitted, it is only because the statute expressly provides therefor, or, by failing to provide any method, necessarily implies a right of action. A method prescribed by statute of

enforcing and collecting taxes is exclusive; and, if the statute embraces a right of action, the conditions and manner of the action, as specified by the statute, must be strictly observed, or the action will not lie.' In this case the question seems to have been thoroughly well considered, and the opinion of the court is supported by an exhaustive citation of authorities from most of the states of the Union. JUDGE COOLEY, in his work on Taxation (2d Ed. p. 16), states that in general the conclusion reached by the courts has been that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the taxes as a debt will not lie; and numerous authorities are cited in support of that doctrine. The law is further announced in the same work (page 435) as follows: 'Sometimes a right to bring suit is expressly given, and, where it is, the statute must be closely followed, and any conditions which are named must be observed.' In 25 Am. & Eng. Enc. Law, p. 312, the statement is made: 'Taxes are not debts, and therefore, as a general rule, the common-law action of debt does not lie for their collection where another remedy is given. The right to proceed by action is, however, frequently conferred by statute.'

"The assessment of property in the city of Brunswick for taxes, and the fixing of the tax rate thereon for each particular year, fix a lien thereon, and, in a sense, constitute a judgment for the taxes, and stand in lieu thereof; and on the 1st day of May all property in default is then subject to be proceeded against by execution, levy, and sale. This is the remedy provided by the charter of the city, and, as has already been observed, no other remedy for the collection of taxes therein has been provided by statute. And it should be observed that no time is fixed, from and after the 1st day of May of each year, within the limit of which this power can be exercised. Surely it will not be seriously contended that where there is a failure in any one fiscal year to exercise this power to issue executions, and levy and sell thereunder, for the purpose of collecting back taxes, not only is the right

to do so lost, but, there being no other remedy provided by statute therefor which can be legally pursued, that therefore the city must lose all back taxes due and unpaid for preceding years. And yet that would be the logical result, if the contentions of the plaintiff upon this question were upheld. But the court is overwhelmingly convinced, and constrained to hold, that such is not the law, and that the executions as issued have been legally issued by the clerk of council, and levied by the marshal, and that the court is without discretion in the premises, and therefore powerless, under the law, to legally enjoin the defendants from the sale of the Oglethorpe Hotel property for the taxes for which it appears to be in default. The plaintiff, by his own laches, has, of course, lost the right to appeal from the assessed valuation made of his property, and possibly to have the same reduced; but the failure to collect these taxes annually cannot properly be claimed to have worked injury and injustice to him, inasmuch as the delay has resulted in an extension of time for the payment of the taxes, and without any accruing interest thereon,—the city alone, by its laches, being the loser in that respect. Whereupon, it is considered, ordered, and adjudged by the court that the injunction prayed for be denied and refused."

Taxation—Executions—Authority of Clerk.

3. One of the points made, with which the learned judge below did not deal, is that, if the clerk had the right to issue executions for back taxes, the law existing at the time such taxes became due should have applied in all particulars, including the time of advertisement; the fact being that the act of 1897 (page 157), passed after a portion of the taxes here involved had become due, changed the length of time of advertising unreturned property from 12 to 4 weeks. We believe that this question is controlled by the Code of the state and the decisions of this court. While the constitution of this state (article 1, § 3, par. 2) provides that no retroactive law, or law impairing the obligation of contracts, shall be passed, remedial statutes are held not to be included. In the lan-

Charters—Amendments—Retroactive Laws.

guage of the Code: "Laws prescribe only for the future; they cannot impair the obligation of contracts, nor generally have a retrospective operation. Laws looking only to the remedy or mode of trial, may apply to contracts, rights and offenses entered into or accrued or committed prior to their passage; but in every case a reasonable time subsequent to the passage of the statute should be allowed for the citizen to enforce his contract, or to protect his right." Pol. Code, § 6. The statute now under consideration did not impair or affect any right of the plaintiff in error, but only changed the remedy provided the defendants in error for the purpose of enforcing their rights. No change was made in anything in which the taxpayer had or could have acquired any right, and the amendment to the city's charter was not in violation of the provisions of the constitution. See, in this connection, Hall *v.* Carey, 5 Ga. 239; Searcy *v.* Stubbs, 12 Ga. 437; Cox *v.* Berry, 13 Ga. 306; Lockett *v.* Usry, 28 Ga. 345; George *v.* Gardner, 49 Ga. 441; Baker *v.* Smith, 91 Ga. 142, 16 S. E. 967; Bacon *v.* Mayor, etc., (decided last term) 31 S. E. 127. Judgment affirmed. All the justices concurring.

McLENDON

v.

CITY OF LAGRANGE.

(*Supreme Court of Georgia, April 22, 1899.*)

Exemptions from Taxation — Municipal Charters — Subsequent Constitution.*—Inasmuch as a provision in a city charter granted in 1856, exempting from municipal taxation property which, under the present constitution, cannot be so exempted, conflicts with that instrument, such exemption was thereby abrogated.

Taxation—Uniformity.—If the rate of taxation imposed by a municipal corporation be uniform as to both realty and personalty, the

*See City of Covington *v.* Commonwealth of Kentucky (U. S.), 1 Mun. Corp. Cas. 591.

McLendon *v.* City of Lagrange

mere fact that two methods of valuation, one applying to realty and the other to personalty, are adopted, does not render the scheme of taxation unconstitutional, so long as it has for its purpose the ascertainment of the true value of both classes of property, in order that all of it may be taxed uniformly and on the ad valorem basis. (Syllabus by the Court.)

ERROR by plaintiff from Troup county superior court. *Affirmed.*

D. J. Gaffney and *M. F. McLendon*, for plaintiff in error. *Longley & Longley*, for defendant in error.

LUMPKIN, P. J. The plaintiff in error, M. F. McLendon, excepted to the refusal of an injunction sought by him to restrain the municipal authorities of the city of Lagrange from enforcing, by a sale of his property under execution, the collection of certain city taxes. The decision of this court is invoked upon two questions only, which we will dispose of in their order.

Case Stated.

1. The plaintiff in error insists that a considerable portion of his property which the city authorities are seeking to subject to taxation is exempt, under the act passed in 1856 to incorporate the city of Lagrange. It may be conceded that, if this act was, as to the matter of municipal taxation, still of force, the position of McLendon would be sound. Counsel for the defendant in error say, however, that so much of the act of 1856 as exempted certain classes of property from municipal taxation was repealed by the act of March 4, 1875. See Acts 1875, p. 179. In reply, the plaintiff in error contends that so much of this latter act as undertakes to repeal the exempting clause in the act of 1856 is, for certain reasons assigned, unconstitutional. It is unnecessary, however, to pass upon the constitutionality in these respects of the act of 1875, for the exemption clause in the charter of Lagrange was effectually and absolutely abrogated by that portion of the constitution of 1877 which declares that "all laws exempting property from taxation,

Exemptions from Taxation—Municipal Charters—Subsequent Constitution.

other than the property herein enumerated, shall be void." Civ. Code, § 5886. The exemption claimed by McLendon was not kept in force by paragraph 4, § 1, art. 12, of the constitution (Civ. Code, § 5935), which preserves the validity of "local and private acts passed for the benefit of counties, cities," etc. That very paragraph explicitly declares that such local and private acts must not be inconsistent with the constitution, and all exemptions from taxation, save those only which are enumerated in the constitution itself (Civ. Code, § 5884), are necessarily inconsistent with the clause of the constitution above quoted.

2. The other point insisted on by McLendon was that the second section of the above-mentioned act of 1875 was unconstitutional, in that it provided for a board of assessors to assess and value for taxation real estate in the city of Lagrange without making provision for the assessment in like manner of personalty, as to which, under the ordinance of the city, taxpayers were allowed to make their own returns. It was contended that this section was violative of paragraph 1, § 2, art. 7, of the constitution (Civ. Code, § 5883), which declares that "all taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax," etc. We do not think this point is well taken. If the rate of taxation be uniform on both realty and personalty, we fail to perceive how differences in the methods of ascertaining value can render the system unconstitutional, so long as the scheme adopted and pursued looks to the ascertainment of the true value of both classes of property, in order that it may be subjected to uniform and ad valorem taxation. Judgment affirmed. All the justices concurring.

Taxation—Uniformity.

DAWSON COMPRESS & STORAGE CO.

v.

CITY COUNCIL OF DAWSON *et al.*

(*Supreme Court of Georgia, April 24, 1899.*)

Election of Officers—Amendment of Charters.—Act 1891 (Pol. Code, § 717 *et seq.*), empowering the authorities of each town or city to elect three freeholders as assessors to value and assess all the property in the town or city liable for taxation, was an amendment to the charter of every town or city in the state which did not, at the time of its passage, have the full power conferred by the act. The fact that a given city already had the power to appoint assessors to assess real property only did not, under the proviso in the act, prevent it from taking effect in such city, so as to authorize the election of assessors to assess the value of personalty.

(Syllabus by the Court.)

ERROR by plaintiff from Terrell county superior court. *Affirmed.*

J. H. Guerry, *J. G. Parks*, and *Rosser & Carter*, for plaintiff in error.

M. C. Edwards Jr., and *H. R. Wilkinson*, for defendants in error.

SIMMONS, C. J. The municipal authorities of the city of Dawson appointed three assessors to assess the real and personal property within the corporate limits of the city. They made an assessment upon certain personal property of the Dawson Compress & Storage Company, and the company refused to pay the assessment. A tax execution was issued and levied upon the property of the company. It filed an equitable petition, praying an injunction against the levying officer and the city authorities, on the ground, principally, that the municipal authorities had no right to appoint asses-

sors to value and assess personal property. At the hearing, the injunction was refused. The company excepted.

Under the charter granted the city of Dawson in 1883, the municipal authorities of that city were given power to appoint assessors to value and assess real property only. By the act of 1891, now section 717 *et seq.* of the Political Code, the general assembly granted the power to all towns and cities in the state to appoint assessors to value and assess all the property, real and personal, within their limits and subject to taxation. This act contained a proviso that it should "not affect towns or cities now having the power to appoint assessors." This act, upon its adoption, became an amendment to the charters of all the towns and cities in the state, except those having already the power to appoint such assessors. The fact that the city of Dawson had already the power to appoint assessors of real estate did not prevent the act from applying to its charter. Properly construed, the proviso in the act excepts only those towns and cities which had already the power to appoint assessors with authority such as that provided in the act. The act applied to all towns and cities except those, and they were left with the power they already possessed. There is some difference between the machinery provided by the act in the matter of appeals from the assessors and that provided by the ordinance of the city of Dawson, but all that it is necessary to say in regard to this is that, where the law and the ordinance conflict, the former must prevail. Whether this is true or not, the plaintiff in error did not attempt to appeal in accordance with either the act or the ordinance. We think, therefore, that the court did not err in refusing an injunction. Judgment affirmed. All the justices concurring.

STATE

v.

HAINES.

(*Supreme Court of Oregon, July 31, 1899.*)

Municipal Corporations — Whether Creating Act Must Be Accepted.*—A legislative act creating a municipal corporation takes effect without acceptance unless therein expressly required.

Same—Intoxicating Liquors.—The legislative assembly not only excluded incorporated towns and cities from the general liquor license laws of the state, but in incorporating a town authorized its common council to regulate and license the sale of intoxicating liquors therein. *Held*, that the common council had authority to prescribe the punishment for selling such liquors without a license, and that a sale of liquor without a license in such town was not a punishable offense in the absence of an ordinance prescribing a punishment therefor.

Municipal Courts — Jurisdiction.—Where a municipal court has been created by the legislature, with exclusive original jurisdiction of all causes arising under the charter or the ordinances of the town, the circuit court of the county has no original jurisdiction of such causes within the limits of the town.

Intoxicating Liquors—Selling without License—Common Law.—Selling intoxicating liquor without a license is not a crime at common law.

APPEAL by defendant from Harney county circuit court. *Reversed.*

Case Stated.

The defendant, Fred Haines, was indicted for the crime of selling intoxicating liquors in less quantity than one gallon, without a license, alleged to have been committed in Harney county, October 10, 1898, by unlawfully selling to Robert Irving one quart of whisky. The defendant having pleaded not guilty, and waived a trial by jury, the cause was submitted upon a stipulation of facts to

*See note at end of case.

the effect that he sold the said intoxicating liquor at the time, in the manner, in the quantity, and to the person as alleged; that said sale was made in the town of Harney, which then was and now is a duly-incorporated municipality; that at the time so charged an ordinance of said town, having been duly passed and approved, was in full force and effect, providing for the granting of licenses, upon certain conditions, to sell intoxicating liquors therein in less quantities than one gallon, but at that time no ordinance had been passed prescribing the punishment of persons convicted of selling such liquors therein without a license; and that no license had ever been issued by the common council of said town to the defendant. The court thereupon found the facts as hereinbefore stated, and, as a conclusion therefrom, that defendant was guilty as charged in the indictment, and sentenced him to pay a fine of $250, from which judgment he appeals, assigning as error the action of the court in refusing to find him not guilty upon the evidence submitted.

L. R. Webster, for appellant.

D. R. N. Blackburn, Atty. Gen., and *William Miller, Dist. Atty.*, for the State.

MOORE, J. (after stating the facts). The question presented for consideration by this appeal is whether the findings of fact support the judgment. It is argued by defendant's counsel that the common council of the town of Harney, having been authorized by the act of incorporation to issue licenses to sell intoxicating liquors, was necessarily invested with power to adopt ordinances providing for the punishment of persons convicted of selling such liquors without a license; and that, a municipal court having been created for said town, and invested with exclusive original jurisdiction to hear and determine all causes arising under the act of incorporation or ordinances passed in accordance therewith, the circuit court for said county was without jurisdiction to try defendant, and hence erred in refusing to discharge him. Counsel for the state maintain, however, that the act incorporating said

town was conditional, and of no binding force until its provisions were fully accepted, and that until an ordinance had been duly passed by the common council prescribing the punishment for selling intoxicating liquors without a license the said circuit court possessed plenary power under the general law of the state to punish a person found guilty of unlawfully selling intoxicating liquors within the limits of said town. It is a sufficient answer to such argument to say that in this country a municipal corporation derives its existence from the act of the legislative assembly creating it, which takes effect without acceptance unless therein expressly required. Dill. Mun. Corp. § 44. Considering the case on its merits, the general license law of the state provides that no person shall sell spirituous or other liquors without first having obtained a license from the county court of the proper county, and prescribes a punishment for a violation thereof. 2 Hill's Ann. Laws Or. p. 1576. Section 11 thereof, however, reads as follows: "Nothing in this act shall be so construed as to apply in any manner to incorporated cities and towns in this state." The legislative assembly, as the guardian of the morals and conservator of the peace of the state, has exclusive control, and regulates the exercise, of the police power, delegating to municipal corporations such portions thereof as it may deem expedient. Tied. Lim. § 212; Dil. Mun. Corp. § 363. The lawmaking power has in emphatic language exempted incorporated towns and cities of this state from the operation of the general laws, and authorizes them to provide special legislation for themselves, and when this is done there is no conflict between the ordinances of the municipality and the general law as to such matters. Dill. Mun. Corp. § 367. The legislative assembly has not only excluded incorporated towns and cities from the operation of the general license laws of the state, but in incorporating the town of Harney authorized its common council to regulate and license the sale of such liquors therein (Laws

Municipal Corporations—Whether Creating Act Must Be Accepted.

Same—Intoxicating Liquors.

Note

1891, p. 999), thereby leaving no room for doubt as to which municipal corporation should exercise this power within that territory. This delegation of power necessarily confers upon the common council authority to adopt ordinances, not only for licensing the sale of intoxicating liquors, but prescribing a punishment for selling such liquors without a license; and such ordinances have the force and effect of laws within the corporate limits. Dill. Mun. Corp. §§ 308, 393. The legislative assembly has power to establish municipal courts to administer the regulations of incorporated towns and cities (Const. Or. art. 7, § 1), and, having created the office of recorder for the town of Harney, and invested that tribunal with power to hear and determine all causes arising under the incorporation act or the ordinances of said town passed in accordance therewith, such delegation *ipso facto* deprived the circuit court for said county of all power therein, except to review the judgments of said recorder. Cunningham *v.* Berry, 17 Or. 622, 22 Pac. 115; State *v.* Dupuis, 18 Or. 372, 23 Pac. 255; State *v.* Tamler, 19 Or. 528, 25 Pac. 71. True, there are certain crimes which, by reason of their magnitude, were indictable and could be punished at the common law; and, in the absence of a statute prescribing a punishment for the commission of such crimes, it has been held that courts of general jurisdiction may enforce the common-law penalty. Bish. St. Crimes, §§ 138, 166. The sale of intoxicating liquor, however, was not a common-law crime (*Id.* § 985), and hence the circuit court for Harney county was without jurisdiction to try the defendant. It follows that the judgment is reversed, and the cause remanded, with instructions to discharge the defendant.

Municipal Courts—Jurisdiction.

Intoxicating Liquors—Selling without License—Common Law.

NOTE.

Creation of Municipal Corporations—Acceptance of Charter.—Municipal corporations exist merely at the pleasure of the state, and, therefore, it is not necessary that the act of incorporation

should be accepted by a newly created municipality unless such acceptance is expressly required by the act. State *v.* Curian, 12 Ark. 321; People *v.* Wren, 4 Scam. (Ill.) 269; Morford *v.* Unger, 8 Iowa 82; Warren *v.* Mayor, etc., of Charlestown, 2 Gray (Mass.) 104; Gorham *v.* Springfield, 21 Me. 58; People *v.* Butte, 4 Mont. 174; State *v.* Babcock, 25 Neb. 709, 26 Am. & Eng. Corp. Cas. 526; Berlin *v.* Gorham, 34 N. H. 266; Proprietors, etc., of Southold *v.* Horton, 6 Hill (N. Y.) 501; *In re* Millville Borough (Pa. Quart. Sess.) 10 Pa. Ct. R. 321.

In a New Jersey case it was said that the legislature may force a municipal corporation upon the corporators against their consent, though such acts are contrary to the principles and genius of our government. Paterson *v.* Society for Establishing, etc., 24 N. J. L. 385. And when the legislature creates a municipal corporation it does not exhaust its sovereign power; it still preserves the right of amending or changing the charter, provided, of course, the vested rights of individuals are not interfered with. State *v.* Shakespeare, 41 La. Ann. 156.

CITY OF WALLA WALLA

v.

FERDON.

(*Supreme Court of Washington, June 29, 1899.*)

Occupation Licenses—Reasonableness of Ordinance.*—Where a municipality has the general power to license occupations, exhibitions, etc., an exercise of such power will not be interfered with by the courts, unless it clearly appears that it is unreasonable; and it cannot be assumed that a license fee of $50 per day imposed upon the public sale by outcry, in the streets of a city of 7,500 people, of drugs and nostrums, with an accompanying show, is unreasonable.

APPEAL by defendant from Walla Walla county superior court. *Affirmed.*

B. L. & J. L. Sharpstein, for appellant.

H. S. Blandford, for respondent.

REAVIS, J. Defendant was convicted of the violation of a city ordinance of the city of Walla Walla (Ordinance No.

*See note at end of case.

628), entitled "An ordinance to regulate and license venders of medicines, drugs and nostrums." Section 1 is as follows: "It shall be unlawful for any person, persons, company, corporation or aggregation of people traveling for the purpose of advertising, selling, or giving away any drug, medicine, nostrum, or any other substance for the cure of, or pretended cure of, any disease or ailment, to give any public exhibition in any hall or building or tent or upon any of the streets or alleys, or vacant lots, or elsewhere, or in any place in the city of Walla Walla, whether the admission to such performances be free or not; and for any person, persons, company, corporation, or aggregation of people by proclamation, public outcry, auction, or theatrical performance, or show of any kind in any hall, or building, or tent, or upon any of the streets or alleys or vacant lots, or elsewhere, or at any place in said city of Walla Walla to sell, barter or give away, or offer to sell, barter or give away, any drug, medicine, nostrum or any other substance for the cure of, or pretended cure of, any disease or ailment, until such person, persons, company, corporation, or aggregation of people shall have first procured a city license therefor, and for such license there shall be paid the sum of $50.00 for each day, or part of a day." The facts were stipulated, and are, substantially, that in the city of Walla Walla, on the 28th day of September, 1898, the defendant, by proclamation and public outcry, offered to sell, and sold, a bottle of medicine prepared and recommended to cure diseases and ailments, without having procured any license; that the defendant was traveling from city to city, engaged in the business of selling medicines in the same manner as this sale was made, and that it was the practice of the defendant to give, at the time and place of making such sales, concert entertainments for the purpose of attracting people for the sale of said medicine, and for the purpose of increasing sales; that he usually gave two such concerts daily on each afternoon and evening, except Sundays; that he sold as much medicine as he could find purchasers for. Error is assigned by counsel for de-

fendant in holding the ordinance valid, and finding the defendant guilty.

It is urged by counsel for appellant that the ordinance is unreasonable, in demanding an extortionate sum for the license. The charter powers of the city of Walla Walla (Laws 1883, p. 270) are very liberal. Section 16 provides that the city shall "have power * * * to license, tax and regulate or prohibit theatrical shows and other exhibitions; to license, tax and regulate auctioneers * * * and to license and tax all hotels, livery stables, business houses and wholesale and retail establishments of every kind and description"; and various sections confer ample police powers upon the city. Section 23 provides, "The city of Walla Walla shall * * * have such other power and privileges not here specifically enumerated as are incident to municipal corporations." There is also provision in section 97 that "when any proceeding, matter or thing is, by this act, committed or left to the discretion of the council, such discretion or judgment, when exercised or declared, is final and cannot be reviewed or called in question elsewhere." The only question before the court is the reasonableness of the ordinance. It was observed in City of Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29: "Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid, because unreasonable, when the power to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts." "An ordinance, to be void for unreasonableness, must be plainly and clearly unreasonable. There must be evidence of weight that it took inception either in a mistake, or in a spirit of fraud or wantonness on the part of the enacting body." Horr & B. Mun. Ord. § 127.

It is maintained by counsel for appellant that the ordinance provides for regulation and license, and not for a tax. It is not deemed necessary, however, in the determination of the case, to discuss or conclude how far the city may

tax the ordinary lines of business conducted in the city, under the authority conferred by its charter. JUDGE DILLON (Municipal Corporations, 4th Ed. § 357) observes: "Concerning useful trades and employments, a distinction is to be observed between the power to license and the power to tax. In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged." Many authorities are cited to sustain the text. The rule thus stated seems to be the correct one. While a municipal corporation such as the city of Walla Walla may not arbitrarily declare a lawful trade or business a nuisance, yet the manner of conducting it may be regulated, and it may be licensed when so regulated. But it cannot be said that the sale of drugs and nostrums by public outcry, and accompanied by a concert, comes within the class of useful trades or employments; but, rather, it falls within another class, where, under the authority to regulate and license, a substantial revenue may be incidental to the license. The supreme court of Illinois, in the City of Carrollton *v.* Bazette, 42 N. E. 837, said: "Under the liberal rule adopted by this court, such license fees, while imposed under the general police power, may, as we have seen, be imposed, not only as a mere means of regulation, but also for revenue. Under such a rule, it becomes not always easy of solution to determine whether or not the imposition of a certain amount to be paid as a license fee is an oppressive exercise of a statutory power; having the effect, whether so designed or not, to suppress and prohibit the business upon which it is imposed, rather than merely to license and regulate it. * * * And it must be admitted that the question, so far as it comes within the discretion of the municipal authorities, is one for them, and not for the courts, to determine. It is only when the ordinance is plainly unreasonable and prohibitive in its character, where there is no power to prohibit, that the courts

may interfere and pronounce it invalid." To the same effect are many other decisions.

The defendant held a license as auctioneer, and also for a show or exhibition. His counsel therefore maintain that as a showman he could attract people, and as auctioneer he could vend drugs and nostrums which were claimed to cure ailments, and that, because there was no license required for the sale of drugs in the usual manner by drug stores, there is discrimination in the terms of Ordinance 628. But we cannot clearly perceive the force of this contention. The sales made by defendant would collect a mass of people,—perhaps obstruct the streets and become noisy and offensive to good order, and require more or less police supervision. There is a material difference between the ordinary dispensation of drugs through the drug store, and these noisy sales by public outcry. And, while the sale of drugs is a legitimate business or trade, it is one peculiarly subject to regulation by the general policy of the state, and qualifications are required of the pharmacist who compounds and dispenses them, as also of the physicians who prescribe them; and it connot be said that the public welfare of the city of Walla Walla requires the sale of nostrums in the manner carried on by defendant. A large discretion is vested in the municipal authorities in the regulation and license of such occupations. The city of Walla Walla has a population of 7,500 people. It appears that the license for a circus and menagerie is $300 per day, according to a city ordinance; and it may be said that it is common knowledge that the municipalities in the state, in the licensing of circuses, have always exercised a large discretion, which has not, that we are aware of, been hitherto questioned. We do not see very clearly how the court can assume, without any further showing before it, that the license fee of $50 per day imposed upon the public sale by outcry of drugs and nostrums, with an accompanying show, is more unreasonable than a license of $300 per day upon a circus. The defendant's business is evidently transient. His various attractions are for the purpose of

calling together a large crowd, and the disposition of as large a quantity of his nostrums in as short a time as it can be done; and a license fee which would be prohibitory on a permanent business, perhaps, would not be onerous on the transient business conducted by the defendant. In accord with the current of accepted authority, the court cannot pronounce the ordinance invalid unless it is plainly unreasonable; and, with the lights here, it is not prepared to come to the conclusion that it is unreasonable. The judgment of the superior court is therefore affirmed.

GORDON, C. J., and ANDERS, DUNBAR, and FULLERTON, JJ., concur.

NOTE.

Review of Municipal Discretion in Imposing License Fees.—Courts will not review municipal discretion in imposing license fees where it has not been abused. Van Baalen *v.* People, 40 Mich. 258; Wolf *v.* Lansing, 53 Mich. 367, 4 Am. & Eng. Corp. Cas. 261; North Braddock *v.* Second Ave. Traction Co., 8 Pa. Super. Ct. 233; Ash *v.* People, 11 Mich. 347; Lyons *v.* Cooper, 39 Kan. 324; Mankato *v.* Fowler, 32 Minn. 364. Nor will a license fee be presumed to be exorbitant, oppressive or prohibitory as a matter of law. *Ex parte* McNally, 73 Cal. 632; *In re* Guerrero, 69 Cal. 88.

But inquiry into the reasonableness of the fee is properly a function of the courts. Vansant *v.* Harlem Stage, 59 Md. 330; State *v.* Orange, 50 N. J. L. 389; Littlefield *v.* State, 42 Neb. 223; 28 L. R. A. 583; Glaser *v.* Cincinnati, 31 Ohio L. J. 243; Elk Point *v.* Vaughn, 1 Dak. 113.

In re TINSMAN.

(*Circuit Court, N. D. California, July 17, 1899.*)

Municipal Corporations—Occupation Licenses—Interstate Commerce.*—An ordinance of a municipal corporation requiring a person, as a condition precedent to the right to solicit, within the corporate limits, orders on behalf of a firm engaged in the business of enlarging portraits in another state, to take out a license, and pay therefor, is an exercise, not of the police power, but of the taxing power; and is, as a regulation of interstate commerce, in violation of the federal constitution.

*See note at end of case.

In re Tinsman

ON PETITION for Writ of *Habeas Corpus*. *Petitioner discharged.*

J. A. Plummer, for petitioner.
A. Sylva, Pros. Atty. of town of Sausalito.
John H. Dickinson, for marshal of town of Sausalito.

MORROW, Circuit Judge. Ordinance No. 51 of the town of Sausalito, Cal., adopted October 14, 1895, provides, among other things, as follows:

"Section 1. It shall be unlawful for any person to engage in or carry on any business, trade, profession or calling, for the transaction or carrying on of which a license is required, without first taking out or procuring the license required for such business, trade, profession or calling. * * *

"Sec. 11. The rates of license shall be according to the following schedule: * * * (16) From each person or firm not maintaining a place of business nor keeping a business office in the town, engaged in the hawking, peddling, itinerant vending or soliciting the sale or purchase of: (A) Books or maps, one dollar per month or fraction thereof. (B) Pictures, one dollar per month or fraction thereof."

The petitioner in May of this year was engaged in taking orders in the town of Sausalito for the enlargement of portraits by the Chicago Portrait Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois, and having its principal place of business and factory in the city of Chicago, in said state. Said corporation had no warehouse, storehouse, or place of business in the state of California; and its business was carried on by means of traveling agents or solicitors, who went from state to state, county to county, and town to town, soliciting orders for the enlargement of portraits. The orders were then by such agents and solicitors forwarded to the company at its place of business in the city of Chicago, and there the portraits were enlarged, and after enlargement returned, directed to said company at the town or place where said orders were taken, and there called for by an agent of the

said company, and delivered to the persons who had ordered the same. The petitioner was arrested, tried, and convicted in the recorder's court of the town of Sausalito for transacting the business of soliciting orders for said company without first having obtained a license so to do as required by said ordinance; and thereafter he was sentenced by the said recorder's court to pay a fine of $20, or serve a period of 20 days in the county jail. The petitioner alleges that he is in the custody of the marshal of the town of Sausalito under such sentence, and he seeks his discharge because his imprisonment, detention, confinement, and restraint are illegal, and in violation of the provisions of the fourteenth amendment to the constitution of the United States; also, of section 8 of article 1 of the constitution of the United States, relating to interstate commerce.

When a law of a state imposes a tax under such circumstances and with such effect as to constitute it a regulation of interstate commerce, it is void on that account. Brown *v.* Maryland, 12 Wheat. 419; Telegraph Co. *v.* Texas, 105 U. S. 460; Moran *v.* New Orleans, 112 U. S. 69, 73, 5 Sup. Ct. 38. An ordinance of a municipal corporation requiring persons or firms soliciting orders on behalf of manufactures of goods to take out a license and pay a tax is an exercise, not of the police power, but of the taxing power; and, when enforced against a person or firm soliciting orders for a manufacturer of goods in another state, it imposes a tax upon, and is a regulation of, interstate commerce, in violation of the provisions of the constitution of the United States. In Robbins *v.* Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, a statute of the state of Tennessee declared that all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, should be required to pay to the county trustee the sum of $10 per week, or $25 per month, for such privilege. Robbins was engaged in soliciting in the city of Memphis, Tenn., the sale of goods for a Cincinnati firm; exhibiting samples for the purpose of

securing orders for the goods. He was prosecuted and convicted for a violation of the statute. The statute, like the Sausalito ordinance, made no discrimination between those who represented business houses out of the state and those representing like houses within the state. There was therefore no element of discrimination in the case. But, notwithstanding this equality, the conviction was set aside by the supreme court on the ground that, whatever the state might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the state, it could not impose upon those who acted as drummers for business houses outside of the state any burden by way of a license tax, for the reason that such persons were engaged in interstate commerce, which must be left free from any restrictions or impositions. Negotiations in the conduct of interstate commerce could not be taxed by the state, or by a municipal corporation under its authority. In Corson *v.* Maryland, 120 U. S. 502, 7 Sup. Ct. 655, the same question arose with respect to a provision of the Code of Maryland, and the same doctrine declared, as in the preceding case. In Asher *v.* Texas, 128 U. S. 129, 9 Sup. Ct. 1, a statute of Texas required any commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, to pay an annual occupation tax of $35. This statute was declared to be unconstitutional, so far as it affected one soliciting orders for a business house in other states. And the case of Robbins *v.* Taxing Dist. was expressly affirmed, to meet the vigorous assault made by the court of appeals of Texas upon the doctrine of that case. In Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 Sup. Ct. 256, an agent of a firm doing business in the city of Baltimore solicited orders in the District of Columbia, without having taken out a license there as required by an act of the legislative assembly of the District of Columbia. The supreme court held that this law was invalid, as construed to include the business of an agent soliciting orders for a business house located outside the District.

In re Tinsman

In Brennan *v.* City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, an order of the city of Titusville provided:

"That all persons canvassing or soliciting within said city orders for goods, books, paintings, wares or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to the said treasurer therefor the following sums, according to the time for which said license shall be granted," etc.

The facts of the case were similar to the present case. One Shephard was a manufacturer of picture frames, and maker of portraits, residing in Chicago, in the state of Illinois, of which state he was a citizen, and in which city he had his manufactory and place of business. The defendant Brennan was an agent of Shephard, employed by him to travel and solicit orders for said pictures and frames. Upon receiving orders for pictures and picture frames, Brennan forwarded the same to Shephard, at Chicago, in the state of Illinois, where the goods were made, and from there shipped to the purchasers, in Titusville, in the state of Pennsylvania, by railroad, freight, and express; and the price of said goods was collected and forwarded to Shephard, sometimes by the express company, and at other times by the agents of Shephard. Brennan, the agent employed by Shephard, was engaged in conducting the business in the manner stated at the time of his arrest, without having obtained a license as required by the ordinance. He was convicted, and sentenced to pay a fine of $25 and costs of suit. From that judgment Brennan appealed to the supreme court of the state, where the judgment was affirmed; the court holding that the ordinance was enacted in the exercise of the police power of the state. City of Titusville *v.* Brennan, 143 Pa. St. 642, 22 Atl. 893. The defendant thereupon sued out a writ of error to the supreme court of the United States. The whole question was again reviewed by the court, and all the previous cases in that court relating to the subject carefully considered. Referring to the decision of the supreme court of the state

holding that the ordinance in question was within the police power of the state, the court said:

"Even if it be that we are concluded by the opinion of the supreme court of the state that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been, and will be, sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

This decision so clearly establishes the law for the case at bar that further reference to authorities appears to be unnecessary. The following cases in the federal courts may, however, be referred to, as presenting different phases of the question: *In re* Kimmel, 41 Fed. 775; *In re* White, 43 Fed. 913; *In re* Spain, 47 Fed. 208; *In re* Houston, 47 Fed. 539; *In re* Nichols, 48 Fed. 164; *In re* Tyerman, 48 Fed. 167; *In re* Sanders, 52 Fed. 802; *In re* Rozelle, 57 Fed. 155; *In re* Mitchell, 62 Fed. 576; *Ex parte* Hough, 69 Fed. 330. The following cases in the state courts indicate the scope of the doctrine as admitted in the several states: Stratford *v.* City Council, 110 Ala. 619, 20 South. 127; Range Co. *v.* Johnson, 84 Ga. 754, 11 S. E. 233; City of Huntington *v.* Mahan, 142 Ind. 695, 42 N. E. 463; City of Ft. Scott *v.* Pelton, 39 Kan. 764, 18 Pac. 954; McClellan *v.* Pettigrew, 44 La. Ann. 356, 10 South. 853; Overton *v.* City of Vicksburg, 70 Miss. 558, 13 South. 226; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298; State *v.* Scott, 98 Tenn. 254, 39 S. W. 1; City of Bloomington *v.* Bourland, 137 Ill. 534, 27 N. E. 692.

It follows that the business of the petitioner is within the protection of the provision of the constitution of the United States relating to commerce among the several states, and the ordinance in question cannot be enforced against him. His imprisonment is therefore illegal, and he must be discharged.

NOTE.

Licenses—Interstate Commerce.—The doctrine stated in the leading case is supported by the weight of authority. See *In re* Flinn (C. C.), 43 Am. & Eng. Corp. Cas. 588; Robbins *v.* Taxing Dist., 120 U. S. 489, 16 Am. & Eng. Corp. Cas. 1; Asher *v.* State of Texas, 128 U. S. 129, 23 Am. & Eng. Corp. Cas. 69; *In re* Nichols, 48 Fed. Rep. 164; Stoutenburgh *v.* Hennick, 129 U. S. 141; *In re* White, 43 Fed. Rep. 913; *Ex parte* Stockton, 33 Fed. Rep. 95; *In re* Kimmel, 41 Fed. Rep. 775; *In re* Spain, 47 Fed. Rep. 208; Carson *v.* Maryland, 120 U. S. 502; Ward *v.* Maryland, 12 Wall. (U. S.) 418, and numerous other decisions, both state and federal.

CHRYSTAL

v.

MAYOR, ETC., OF CITY OF MACON.

(*Supreme Court of Georgia, July 18, 1899.*)

Licenses—Interstate Commerce.*—A business carried on by a nonresident of this state through agents, some of whom solicit from citizens of Georgia orders for goods, and forward the same to their principal, in the state of his residence, and others of whom, after the arrival of shipments from that state, make deliveries to and collections from the customers here, is not protected by the interstate commerce clause of the federal constitution from municipal taxation in Georgia, when it affirmatively appears that some of these goods are never in fact ordered or purchased until after they are actually within the limits of this state.

Same—Same—Portraits and Frames.—The above is applicable to a business in the course of which each customer, though he actually orders a portrait from a dealer in another state, has the right or privi-

*See *In re* Tinsman (C. C.), *ante* and *note*.

Chrystal *v.* Mayor, etc., of City of Macon

lege of selecting and purchasing from the latter's agent in this state a suitable frame for every portrait, from a stock of frames shipped to Georgia for this purpose by the dealer; no customer, however, being in any instance bound to purchase a frame unless he chooses to do so. So far as respects the sale of the frames, this is a Georgia business, pure and simple, and has no interstate feature.

Same—Same—Validity of Ordinance.—The recorder did not err in holding that the municipal ordinance under which the plaintiff in error was tried and convicted was not violative of the above-mentioned clause of the constitution of the United States, nor in adjudging that he was guilty. There was consequently no error in refusing to sanction the petition for *certiorari*.

(Syllabus by the Court.)

ERROR by defendant from Bibb county superior court. *Affirmed*.

Estes & Jones, for plaintiff in error.

Minter Wimberly, for defendant in error.

LUMPKIN, P. J. The Chicago Portrait Company carried on, through its agents in this state, a business, the nature of which is sufficiently indicated in the headnotes. Chrystal, one of its delivering agents, was, in the municipal court of the city of Macon, convicted of "doing business in said city without a license." The only defense he set up was that the ordinance under which he was prosecuted was violative of the interstate commerce clause of the federal constitution, and his petition for *certiorari* presented for adjudication this question only. The judge of the superior court refused to sanction the petition, and the case is here for review.

We have, without serious difficulty, reached the conclusion that, in so far as the business in question related to the sale and delivery of picture frames, it was certainly outside the scope and operation of the above-mentioned clause of the constitution of the United States. No customer of the portrait company agreed to purchase, or was bound to take and pay for, a picture frame, unless he chose to do so after inspecting the portrait which he had ordered; and, in case he then

Licenses—Interstate Commerce.

desired to purchase a frame, he selected it from a stock of frames which had already been shipped from Illinois into Georgia, consigned to and received by the company's agent here. The mere fact that at the time of ordering the picture the customer may have reserved the right to select and buy a picture frame is of no consequence whatever. Nor does it matter that the so-called privilege of purchasing picture frames from this company was exclusively in those who had ordered pictures. In no view of the matter could it be fairly said that a binding contract of any description relative to the purchasing of a picture frame existed between the company and any purchaser until a sale negotiated in this state was actually effected here. It was argued that a portrait and its frame were so intimately connected that both together really constituted a unit or single thing. This may be quite true, after a portrait is placed in a frame; but, manifestly, until this has been done they are separate and distinct things, each having its own independent commercial value, and the scheme of the very business under discussion distinctly recognizes that this is so. The company unquestionably sells portraits without selling frames; and, when it does sell a frame, that is a complete transaction, in and of itself.

Same—Same—Portraits and Frames.

The conclusion necessarily follows that the judgment of the municipal court was right and lawful, and that the superior court properly so held. Judgment affirmed. All the justices concurring.

Same—Same—Validity of Ordinance.

CITY OF KANSAS CITY
v.
GRUSH.

(Supreme Court of Missouri, June 26, 1899.)

Contruction of Ordinance.—An ordinance provided that "commission merchants and produce dealers" should pay a certain license. *Held*, that, if the ordinance was valid, the license could be exacted of either commission merchants or produce dealers.

Same — Licenses — Constitutional Law.*—Where a city has no power to impose a license tax on any business not specially named in its charter, and merchants in all lines are placed therein in one class, an ordinance of the city which singles out a subdivision of such class, and imposes an occupation license upon it, leaving merchants in other lines of business exempt from such tax, is in violation of the constitutional guaranty of equality of taxation and equal protection of the laws.

APPEAL by defendant from Jackson county criminal court. *Reversed.*

Case Stated.

Defendant was prosecuted and convicted in the criminal court of Jackson county for the breach of an ordinance of said city entitled "An ordinance regulating and defining the amount of license to be paid by artists, agents, hotels and others." Section 502 of said ordinance provides that "no person or corporation shall carry on or engage in the following occupations, trades, or business in the City of Kansas without a license therefor from said city and the charge for such license shall be as follows: * * * Commission merchants and produce dealers, $50." By section 536 it is made a misdemeanor to violate said ordinance, and a fine of not less than $10 and not more than $500 is imposed. The cause was tried upon an agreed statement of facts. The defendant is, and was

*See note at end of case.

at the date of filing the information, a dealer in produce in Kansas City, and was a produce dealer engaged in the business of buying and selling potatoes, apples, and vegetables of all kinds,—a dealer in general produce,—and had and has a store and fixed place of business. It was further admitted that the city charges and collects no license from grocers, other than a merchant's license, and that the defendant had paid his merchant's license. No license tax is levied and collected on merchants generally, other than required by article 3, §§ 550 and 551, of the Revised Ordinances of said city, which the defendant has paid. An ordinance of said city (No. 5299) was also read in evidence, which provided: "Section 1. No person shall sell or offer for sale, barter, or exchange, any car-load lots, or any less quantity, of fruit, vegetables, or farm produce, butter, cheese, eggs, game, or poultry, contained in any railroad car or in any railroad freight depot or warehouse within Kansas City, Missouri, without first obtaining an annual license to engage in such business, under a penalty of not less than $25 nor more than $100 for each offense: provided, this section shall not apply to any farmer, gardener, fruit or vine grower, orchard or vineyard, nor to any commission merchant having a store or established place of business in this city. Section 2. Every person, before engaging in the business or occupation mentioned in the preceding section, shall pay an annual license fee of fifty dollars, in the manner provided by the ordinance of said city concerning licenses." The defendant, among other instructions, requested the court to declare the law to be that, under section 502 of article 1 of the ordinances, a license was not required of one who is a simple produce dealer, and that, from the whole of said section, the words "commission merchant and produce dealers" are to be construed as meaning those who are both commission merchants and produce dealers, and not as meaning those who are either produce dealers or commission merchants. The criminal

court refused to so declare the law, but held that it meant commission merchants or produce dealers. The defendant then prayed the court to declare the law to be that, "construing the words 'commission merchants and produce dealers,' in section 502 of article 1 of the ordinances of Kansas City, Mo., to mean either commission merchants or produce dealers, the portion of said ordinance requiring a produce dealer to pay a license of $50 is unconstitutional and void, as not being a uniform tax upon the same taxable class of taxable subjects within the territorial limits of the authority levying the tax." The declaration of law the court also refused to give. This last ruling unquestionably involved the construction of section 3, art. 10, of the constitution of this state, and hence this court has jurisdiction to determine the appeal in this case.

Hamner, Hardon & Hamner, for appellant.
Chas. E. Burnham and *Darius A. Brown*, for respondent.

GANTT, P. J. (after stating the facts). 1. Proceeding in the order of the declarations of law asked and refused, can the contention of defendant be sustained, that, conceding the constitutionality of the ordinance, a produce dealer who was not also a commission merchant was not required to take out a license? The rule "*Noscitur a sociis*," is invoked; and a most plausible argument is based upon the proposition that as almost all the other vocations are connected by the disjunctive "or," and as a rule in this ordinance only one business is named in each clause, and, where different vocations that are not carried on together are put in the same clause, they are connected by the disjunctive, and, when vocations that are usually carried on together by the same party, they are put in the same clause, and are connected by the conjunctive "and": "Intelligence office and employment bureau, $100.00 per year. Commission merchants and produce dealers, $50.00 per year. Photographers' or artists' agents, $50.00 per year. Storage or transfer

houses, $50.00 per year. Wagon yard and wood dealer, $50.00 per year." In Kansas City *v.* Lorber, 64 Mo. App. 604, this identical point was raised on this same ordinance; but the Kansas City court of appeals, without special discussion, evidently ruled adversely. After weighing the whole ordinance together, we are of opinion that the criminal court properly construed that the license, if constitutional, could be exacted of either commission merchants or produce dealers, and a person, firm, or corporation following either vocation or occupation could not escape the tax because he or they did not engage in both. This, we think, is the ordinary meaning of the words in the connection in which they are found. There is no such general and prevailing custom of uniting produce dealers and commission merchants in one person, firm, or corporation as to lead us to the conclusion sought by defendant. The ordinance simply grouped the various persons who should pay the $50 license.

2. Giving this ordinance, then, the same construction given by the criminal court and the Kansas City court of appeals, to the extent of holding that the license may be required of produce dealers engaged in that business alone, still its validity as a constitutional exaction is presented. We think no doubt whatever can exist that, under the agreed statement, defendant was a merchant. State *v.* Whittaker, 33 Mo. 457; And. Law Dict. 671; Webst. Int. Dict. "Merchant"; Cent. Dict. 3713; Kansas City *v.* Lorber, 64 Mo. App. 604. There is no specific authority conferred upon Kansas City to tax produce dealers, *eo nomine*; but its power to do so is referable to subdivision 10, § 1, art. 3, of the charter, which authorizes said city to license, tax and regulate "merchants"; and the general laws of the state forbid any municipality to impose a license tax on any business, avocation, or calling, unless the same be specially named as taxable in its charter. Rev. St. 1889, § 1900. That the license fee which the city seeks to compel defendant to pay is a tax, does not admit of doubt. On its face it is perfectly

apparent that the purpose of the ordinance is to raise revenue, and when this is the case it is a tax, and must conform to the requirement of section 3, art. 10, of our constitution, which provides that taxes "shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." City of St. Louis *v.* Spiegel, 75 Mo. 145; *Id.*, 90 Mo. 587, 2 S. W. 839. In these two cases it was held that section 3 of article 10 of the constitution prevents discrimination between objects belonging to the same class of subjects within the territorial limits of the authority levying the tax, and accordingly an ordinance which required a license tax of $100 on meat shops in one part of the city, and $25 in the rest of the city, was void. Likewise, an ordinance requiring a license tax of all meat shops, but providing that owners of shops in one portion of the city could sell both at their shops and on their wagons, while those in the old city limits could only sell at their shops, was held to be unconstitutional. Keeping in view, then, that the city has no power to impose a license tax on any business not specifically named, and that the right to tax defendant's business is solely because he is a merchant, it follows that the people, in the freeholder's charter, have placed all merchants in one class, for the purpose of an occupation tax, and it is essential that it be uniform and equal; but the common council, in this ordinance, has clearly discriminated by taxing this merchant, who deals in produce, and exempting those who deal in dry goods or groceries alone. The inequality of the exaction arises as readily in this case by arbitrary classification as it did in the Spiegel Case by levying different amounts on the same class. No power was conferred upon the city to reclassify merchants, and tax one subclass and exempt another. Nor is there any reason why a merchant who deals altogether in produce should be required to pay $50 for the privilege of carrying on his business, in addition to his *ad valorem* tax, while his neighbor, who deals in groceries, hardware, or dry goods, is wholly

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exempt from a license tax. Both are merchants, and neither are subject to more burdens than the other. No doubt exists as to the power of the legislature or of a special charter to divide the various occupations into different classes, and that a tax upon all that class would not be obnoxious to the constitution merely because another class was not taxed; but when, as in this case, the ordinance singles out a part of a legal class, to wit, merchants, and imposes a burden upon it, and exempts all others of the same class, then those against whom this unjust discrimination is directed may justly complain of the violation of the constitutional guaranty of equality of taxation and equal protection of the laws.

Our conclusion is that the criminal court erred in refusing the second declaration of law requested by defendant,—that by reason of the unequal burden imposed upon defendant by the arbitrary and artificial classification of defendant's business, and exempting all other merchants, by which designation alone the city was authorized to require a license tax, his constitutional right was violated, and so much of said ordinance was and is void. The judgment is reversed.

SHERWOOD and BURGESS, JJ., concur.

NOTE.

Licenses—Charter Limitations.—The municipal charter or other statutory enactments furnish the measure of the power of the council in classifying, grading and ascertaining licenses, and must not be exceeded. Kniper *v.* City of Louisville, 7 Bush (Ky.) 599. See also St. Louis *v.* Groom, 46 Mo. 574.

CORBY

v.

CHICAGO, R. I. & P. RY. CO.

(*Supreme Court of Missouri, June 14, 1899.*)

Railroad in Alley—Destruction of Access—Municipal Powers—Rights of Abutter.—A municipal corporation cannot grant to a railroad the right to construct and operate a switch track in an alley in such a manner as to unreasonably interfere with its use by other members of the public, or with the right of access of an abutting owner to his property.

ERROR by defendant from Buchanan county circuit court. *Affirmed.*

This is a suit to enjoin the defendant from building and operating a side track of its railroad up a 20-foot alley, through a certain block of ground in the city of St. Joseph, and abutting 160 feet on which plaintiff owns four lots, described as "Lots 7, 8, 9, and 10, in Block 52, of the Original Town of St. Joseph," under authority of Ordinance No. 1,490 of said city.

Plaintiff's amended petition is substantially as follows: "That defendant, pursuant to the provisions of said last-mentioned ordinance, and without compensation or any offer of compensation to plaintiff, threatens, and has agreed with said firms in block 52, to lay its track up the center of said alley, from its present terminus at the south line of Sylvanie street to the south line of Edmond street, and as a continuation of the track laid under the ordinance first above mentioned; that by constructing said track, and running its engines and cars thereon, plaintiff's property aforesaid will be greatly injured, and by reason of the diverting of travel, the closing of access to plaintiff's lots in the rear, the noise,

*See note at end of case.

smoke, heat, and dangerous proximity of said tracks, engines, and cars, plaintiff's said property will be irreparably damaged and practically destroyed in its present use and for all purposes intended; that all of said tracks, laid and to be laid, are and will be for the convenience and private use of said firms alone, and to provide for and afford to said firms private and special shipping facilities not accorded to the general public or to other localities within said city limits; that defendant, for the purpose of its freight business and traffic, owns and maintains on the south side of Messanie street, and opposite the termination of said alley, a large and commodious freight depot, with offices, a switch yard, tracks, and appurtenances, all ample and sufficient to accommodate the public generally, and its entire freight business within the limits of said city; that said depot and yards are accessible over paved streets in all directions, and within 1,200 feet of the buildings and places of business heretofore named in said block 52; that defendant is about to, and threatens immediately to, so appropriate this plaintiff's property and the whole of said alley between Edmond and Charles streets, and by running its engines and cars into and upon the same to deprive plaintiff wholly of the use of the same, and to totally destroy said alley for the purpose for which it was dedicated. Wherefore plaintiff prays that the defendant, its agents and servants, may be restrained and perpetually enjoined from laying its track as aforesaid, or running its engines and cars into or upon any part of said Charles street, or the alley between Edmond and Charles streets, as aforesaid, and for all other and proper relief."

The defendant answered, admitting that it was a railroad corporation, as charged, and that for the purpose of increasing and improving its railroad facilities, for the benefit and use of the public, it procured from the common council of the city the right to construct and maintain a switch or side track along and in the alley described, from the south line of Sylvanie street to the south line of Edmond street; said right being embodied in Ordinance No. 1,490, which is as follows:

"Section 1. That the right of way be, and is hereby, granted to the Chicago, Rock Island & Pacific Railroad Company to lay a side track in the alley between Fourth street and Fifth street, from the south line of Sylvanie street to the south line of Edmond street, and across Sylvanie and Charles streets, upon the following conditions:

"Sec. 2. Said track shall be laid and maintained upon the established grade of said streets and alleys, and shall be laid and maintained so as to leave free and unobstructed all water ways, sewers or appurtenances which are or may be hereafter constructed or laid in said streets and alleys; and in the event of any sewer pipe or main being laid by the city in said streets and alleys said railroad company shall care for and maintain, remove, and relay its track or appurtenances at its own expense, and shall place them in condition to render it safe and practicable to lay, construct or repair said sewers, mains or pipes within five (5) days from the written notice from the city engineer so to do, and said company shall construct or reconstruct any inlet, catch basin or other appurtenance to any sewer, pipe or main belonging to the city which may be rendered necessary in the judgment of the city engineer by the construction and maintenance of the track permitted to be laid hereunder; and the owners or occupants of the abutting property shall have the right at all times to connect with any sewer, pipe or main in said streets or alleys, under a permit from the city engineer.

"Sec. 3. In consideration of the privilege herein granted said railroad company shall pave said alleys and the alleyways of each intersecting street with vitrified brick, excepting the space between the rails and two feet outside thereof, which excepted space for the whole length of said track shall be covered with four-inch white or burr oak plank after the track has been thoroughly ballasted with broken stone. The laying of said track, together with the paving, ballasting and planking shall be done and completed within six (6) months from the approval of this ordinance by the mayor, and said track, paving and planking shall be kept in good

repair by said company. In further consideration of this grant, said railroad company shall hold the city of St. Joseph harmless from all costs and damages whatsoever, together with all expenses of litigation, including witness and lawyers' fees, arising from any cause of action which may accrue by reason of the laying, maintenance or operation of the tracks or appurtenances permitted to be laid under this ordinance.

"Sec. 4. The work of constructing, laying, relaying and repairing the track permitted to be laid hereunder, and of the paving and planking hereinbefore described, shall be done under the direction and agreeable to the instructions of the city engineer, and said company shall make and perform any repairs which may become necessary to said track, paving or planking in the judgment of said engineer, within five (5) days after written notice by him so to do, which notice shall be deemed as served when left at the office of any officer or agent of said railroad company.

"Sec. 5. Said track shall be used only for the loading and unloading by the abutting property, and cars shall not stand thereon more than twelve hours.

"Sec. 6. The laying of the track above referred to, or its operation or use by said railroad company, shall constitute an acceptance on the part of said railroad company of the provisions of this ordinance, and the right to construct said track shall commence on the passage and approval of this ordinance, but the neglect, refusal or failure of said railroad company to comply with any provision of this ordinance shall of itself work a forfeiture of any right herein granted."

The answer further alleged that it was about to build said side track or switch when restrained by order of the court, and that the said side track or switch was a continuation and part of the defendant's railroad, for the use and convenience of the defendant and all those who might have dealings with it and use its said railroad, and denied each and every allegation of the petition not so specifically admitted.

The plaintiff demurred to the answer, on the ground that

it "does not state facts sufficient to constitute a defense." This demurrer was sustained, and, the defendant declining to plead further, final judgment was entered, enjoining defendant "from laying its track or running its engines and cars into or upon any part of the alley between Fourth and Fifth streets, from the south line of Edmond street to Charles street, and running through block fifty-two (52) of the original town (now city) of St. Joseph, Buchanan county, Missouri." Defendant then brought the case to this court by a writ of error.

Brown & Dolman, for plaintiff in error.

B. R. Vineyard and *Jas. F. Pitt*, for defendant in error.

MARSHALL, J. (after stating the facts). The defendant contends that "the answer states a good defense. *Prima facie* the proposed construction, maintenance, and operation of the track, under the city ordinance, was lawful, for a public use, and not a nuisance; and the burden rested upon the plaintiff to prove that the power exercised by the city was improperly exercised in this particular case,"—and it cites, in support of this proposition, Brown *v.* Railway Co., 137 Mo. 529, 38 S. W. 1099; Kansas City, St. J. & C. B. R. Co. *v.* St. Joseph Terminal R. Co., 97 Mo. 457, 10 S. W. 826; Gaus & Sons Mfg. Co. *v.* St. Louis, K. & N. W. R. Co., 113 Mo. 308, 20 S. W. 658, and Cross *v.* Railway Co., 77 Mo. 321. Defendant further contends that "the presumption is that the action of the council was right and proper, and that, in granting the license, due regard was had to the rights of the public and of the owners of property abutting upon the alley," and cites, in support of this, Brown *v.* Railway Co., 137 Mo. 529, 38 S. W. 1099. These propositions may be fully conceded, and yet they will not work a reversal of the judgment below. The condition here presented is that the plaintiff owns nearly all the property abutting on the east side of an alley 20 feet wide, which runs north and south through block 52 of the city of St. Joseph, extending from Charles street to Edmond street, and that

the defendant is about to construct, maintain, and operate a steam-railway switch or side track along and upon said alley, under a power granted to it by an ordinance of said city, which by section 5 provides: "Said track shall be used only for the loading and unloading by the abutting property, and the cars shall not stand thereon more than twelve hours." It is not stated whether this is consecutively or cumulatively. This fairly raises the whole question of the rights of the abutting property owner, and of the power of the city with respect to putting a steam-railroad track and operating the same in the alley, and all *prima facie* presumptions are merged in the complete case here presented.

The propositions of law pertinent to this case have so thoroughly and recently undergone adjudication by this court that little more need be said than to refer to the decided cases, and to apply the principles they establish to the case at bar. In Tate *v.* Railway Co., 64 Mo., loc. cit. 158, it was said by NAPTON, J., that the right of way may be given to construct railroads on streets "where the only obstruction is the passage of trains, and not where embankments have been made above the grade, or where the street is used for side tracks or other structures for the convenience of the road. For these purposes, the railroad company must procure sufficient ground, not altogether dedicated to uses entirely inconsistent with the purposes to which they propose to apply it." In Dubach *v.* Railroad Co., 89 Mo., loc. cit. 488, 1 S. W. 87, HENRY, C. J., said: "If the character of a street should be such that defendant's track could not be laid upon the street without hindering the public from using it, then, no matter how important to the company that its track should be laid in that street, it could not be done. Nor is it competent for a city to authorize such use of a street, dedicated as a street, as will destroy it as a thoroughfare for public use." In Lockwood *v.* Railroad Co., 122 Mo. 86, 26 S. W. 698, after discussing the general rights of the abutting owner and of the city, GANTT, P. J., said (122 Mo., loc. cit. 99, 26 S. W. 701): "In many cases it has

been said that the railroad company occupied the street along with the public; but it is perfectly plain that in this case no wagon of ordinary width can pass on this street with safety when the trains of defendant are on it, even where it had only a single track. * * * Now, while it is true that the public must submit to all reasonable inconveniences in the highways yet the highways are created for the public and abutting owners, and they have an unquestionable right to require a reasonable use by all who are entitled to use them. As was said by this court in Schopp *v.* City of St. Louis, 117 Mo. 131, 22 S. W. 898, 'the public highways belong, from side to side and from end to end, to the public,' and 'the public are entitled, not only to a free passage along the highway, but to a free passage along any portion of it not in the actual use of some other traveler,' and the abutting property owner has the right to the free and unobstructed passage to and from his property. Said LORD ELLENBOROUGH in Rex *v.* Cross, 3 Camp. 224: 'And is there any doubt that if coaches, on the occasion of a rout, wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects who wish to pass through it in carriages or on foot, the persons who cause and permit such coaches to so wait are guilty of a nuisance.' * * * But we are satisfied that the maintenance of this steam railroad, in this narrow highway, devoted, as it has been, to wholesale business, requiring heavy board trucks and wagons, must necessarily result in denying the public and the abutting owners the right to use their street, and that the ordinance virtually destroys it for street purposes, and therefore the assembly had no power to enact it. It was an attempt to convert it to a use different from that for which the city acquired it, and is in contravention of its charter, which declares that 'no railroad shall be so constructed as to prevent the public from using any road, street or highway along or across which it may pass,' and the general law of the state that prohibits a railroad from impairing the usefulness of any street.'' In Knapp, Stout & Co. *v.* St. Louis Transfer Ry.

Co., 126 Mo. 26, 28 S. W. 627, BLACK, C. J., reviewed the cases decided prior to that time (1894), and said: "Taking these cases all in all, it is very clear a municipal corporation has no power to grant to a railroad company such use of a street as will destroy its usefulness as a public thoroughfare, or destroy or unreasonably interfere with the right of an abutting property holder to access to and from his property. Though the city gave its assent to the construction of this railroad track, still the defendant was bound to construct and use the track with due regard to the rights of the public and adjacent property owners. The defendant has no greater rights than others, for in the use of the street it is but one of the public, and must conduct and operate its track accordingly. As said in Railroad Co. *v.* Twine, 23 Kan. 585: 'A railroad company has no higher rights in a highway than an individual. It may share its use, but cannot monopolize it; and the owner of a lot abutting on the highway, and who has special need thereof for ingress and egress from his lot, is especially damaged by any monopoly of the use of the highway by a railroad company.' Guided by these principles, it is plain this switch track is an illegal structure, for it in effect deprives the plaintiff of any use of its Hall street front. We have here a virtual attempt to confiscate plaintiff's right of access, which right, we have seen, is private property. The structure is a public nuisance, and, as to the plaintiff, it is also a private nuisance, and ought to be removed with all due speed." In Schulenburg & Boeckeler Lumber Co. *v.* St. Louis, K. & N. W. R. Co., 129 Mo. 455, 31 S. W. 796, MACFARLANE, J., followed approvingly Lockwood *v.* Railroad Co., 122 Mo. 86, 26 S. W. 698, and held that "a city cannot confer authority to construct a steam railroad on a sidewalk and adjacent part of the street, where the abutting property owner's use of the same will be permanently hindered, and the street rendered useless as a thoroughfare for travel." In Sherlock *v.* Railway Co., 142 Mo. 172, 43 S. W. 629, GANTT, P. J., again reviewed the cases in our state on this question, and said: "More than this, the city

has no power to grant the use of this alley to a railroad company to lay its tracks therein, and operate its engines and cars thereon, if the ordinary and reasonable effect of such grant will be to prevent, or unreasonably impede and obstruct, the passage of vehicles belonging to the abutting owners, or other members of the public, desiring to use such alley. Now, the facts of this case are so obvious that their bare statement demonstrates that the ordinance permitting the laying of this track, with the unlimited right to run steam engines and cars thereon at all times of day or night, practically gives the defendant the monopoly of that alley; the very nature of its use by the defendant each time totally obstructing it, and excluding all others therefrom. Such a use is not to be compared to that ordinary inconvenience or delay which an ordinary wagon or vehicle may cause to another of like kind."

The reason underlying all these cases is that roads, highways, and streets, whether dedicated or condemned, are held by the public authorities in public trust, primarily for the free and common use of the whole traveling public, with special privileges to none, and, secondarily, for the benefit of the owners of abutting property, to afford access to their property, while the alleys are held in trust for the special and particular benefit of the property in the block which abuts the alley, and are intended to afford rear access to such property. The whole public is interested in the roads, highways, and streets, because they subserve a general public use, and therefore property not directly abutting them may be charged with their establishment, because, being continuous, and extending between far-distant termini, they are essential and useful to all persons owning property fronting on any part thereof; but the alley in each block is a complete entity unto itself, and it is immaterial to the owners of property in one block whether there is an alley in the next, or any other, block, or not, and likewise immaterial to the general traveling public whether there are any alleys or not, and hence the cost of establishing an alley is naturally and logically

confined to the property in the particular block through which it is opened and upon which the property abuts. City of St. Louis *v.* Juppier, 16 Mo. App. 557. Included in the right of access is the right of the abutting owner to temporarily obstruct the free and open passageway over a portion of the street for the purpose of loading and unloading goods to and from his premises. This principle is recognized in Gerdes *v.* Foundry Co., 124 Mo., loc. cit. 354, 25 S. W. 559, where MCFARLANE, J., speaking of the obligation on the public authorities to keep a street free from obstruction and fully open for public use, said: "There is a well-recognized qualification to this strict rule, which is declared by JUDGE DILLON in this language: 'But it is not every obstruction, irrespective of its character or purposes, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as, they are reasonably necessary. There need be no absolute necessity. It suffices that the necessity is a reasonable one.' 2 Dill. Mun. Corp. (4th Ed.) § 730, and cases cited; Stephens *v.* Macon, 83 Mo. 346; Welsh *v.* Wilson, 101 N. Y. 256, 4 N. E. 633." Accordingly it was held in that case that a manufacturing company "had no right to make a permanent use of the streets for storing its property, or to make such temporary use as would unreasonably interfere with travel. The unreasonableness of the use should be measured by the character of the articles to be handled."

The sum of it all is that the public cannot grant to any one exclusive rights in a public highway, nor can it authorize any one to use the whole, or any part thereof, in such a

manner as to unreasonably interfere with its use by the other members of the public, or with the right of access of the abutting owners to their property. Neither can any abutting owner use any part of the highway in such a manner as to permanently, or for an unreasonable length of time, obstruct or impede the use of the highway by the public. Storing merchandise on a sidewalk, or placing it there for any length of time for advertising purposes; placing finished products of a factory on the highway, and leaving them there for an unreasonable or unnecessary length of time, awaiting shipment or for any other purpose; erecting permanent advertising signs on or over any part of the highway; standing hauling or delivery wagons on the highway in front of a place of business for a longer time than is reasonably necessary to load or unload them,—these and many other acts that might be mentioned are unlawful, and constitute nuisances, whether authorized by the public authorities or not. In the case at bar it is plain that while a train of cars was moving along, or standing upon this 20-foot alley, no vehicle could use it; and the ordinance puts no limitation upon the continual and continuous use of the alley, by day and by night, by the railroad company, and therefore the case falls within the prohibitions established by the cases cited, and the ordinance is void. But this ordinance is worse than any that has ever before been construed by this court, for it authorizes the cars to stand on the switch track in this alley for 12 hours. True, the ordinance is vague, in not specifying whether the 12 hours must be consecutive or cumulative; but the reasonable interpretation is that the track must not be used for loading and unloading cars more than 12 hours consecutively. This, in itself, makes an unreasonable use of the alley; but there is nothing in the ordinance to prevent the railroad company from standing one train of cars in the alley for 12 hours, removing them, and, after an interval of an hour or two, standing another train of cars there for 12 hours, and thus make the use of the alley practically permanent and contin-

Note

uous, to the exclusion of the peculiar rights of the owners of the abutting property in the block. This feature is patent on the face of the pleadings. It is a fact admitted in the case. No testimony is necessary to satisfy the court that all *prima facie* presumptions in favor of the proper exercise of power by the city, or of the lawfulness of the use by the railroad company, have been overthrown by this pertinent and controlling fact. Testimony in such a case is wholly unnecessary, for it could throw no light upon what common sense and the experiences of mankind, of which the court takes judicial notice, already make plain by the simple reading of the ordinance. The judgment of the circuit court, permanently enjoining the construction, maintenance, or operation of the railroad switch track, was proper, and is affirmed. All concur.

NOTE.

Railroads in Streets—Destruction of Public Use.—In permitting a street to be used for the laying of railroad tracks for the purpose of operating trains over the same, a city has no right so to obstruct the street as to deprive the public and adjacent property holders of its use as a highway. It is not competent for a city to authorize such use of a street as will destroy it as a thoroughfare for the public use. Ligare *v.* Chicago, 139 Ill. 46, 28 N. E. Rep. 934; Dubach *v.* Hannibal & St. J. R. Co., 89 Mo. 483, 29 Am. & Eng. R. Cas. 609, 1 S. W. Rep. 86; Sherlock *v.* Kansas City Belt Ry. Co., 146 Mo. 172, 64 Am. St. Rep. 551; State *v.* Murphy, 134 Mo. 548, 56 Am. St. Rep. 515; Lockwood *v.* Wabash R. Co., 122 Mo. 86, 43 Am. St. Rep. 547; Tallon *v.* Mayor, etc., of Hoboken (N. J.), 7 Am. & Eng. Corp. Cas., N. S., 545; Lake Shore & M. S. R. Co. *v.* Elyria, 14 Ohio C. C. 48, 7 Ohio Dec. 312.

Compare *Re* Selectmen, 169 Mass. 495, 48 N. E. 763.

manner as to unreasonably interfere with its use by the other members of the public, or with the right of access of the abutting owners to their property. Neither can any abutting owner use any part of the highway in such a manner as to permanently, or for an unreasonable length of time, obstruct or impede the use of the highway by the public. Storing merchandise on a sidewalk, or placing it there for any length of time for advertising purposes; placing finished products of a factory on the highway, and leaving them there for an unreasonable or unnecessary length of time, awaiting shipment or for any other purpose; erecting permanent advertising signs on or over any part of the highway; standing hauling or delivery wagons on the highway in front of a place of business for a longer time than is reasonably necessary to load or unload them,—these and many other acts that might be mentioned are unlawful, and constitute nuisances, whether authorized by the public authorities or not. In the case at bar it is plain that while a train of cars was moving along, or standing upon this 20-foot alley, no vehicle could use it; and the ordinance puts no limitation upon the continual and continuous use of the alley, by day and by night, by the railroad company, and therefore the case falls within the prohibitions established by the cases cited, and the ordinance is void. But this ordinance is worse than any that has ever before been construed by this court, for it authorizes the cars to stand on the switch track in this alley for 12 hours. True, the ordinance is vague, in not specifying whether the 12 hours must be consecutive or cumulative; but the reasonable interpretation is that the track must not be used for loading and unloading cars more than 12 hours consecutively. This, in itself, makes an unreasonable use of the alley; but there is nothing in the ordinance to prevent the railroad company from standing one train of cars in the alley for 12 hours, removing them, and, after an interval of an hour or two, standing another train of cars there for 12 hours, and thus make the use of the alley practically permanent and contin-

To all of this the plaintiff excepted, and presents the case to this court for review.

The city of Horton is a city of the second class, and High street is one of the public highways of such city. In 1893, George W. Leverton was mayor, Henry Killion marshal, and M. Nadeau street commissioner. Adam Bitzer, during the year 1892, was owner of lot 20, in block 16, in the city of Horton, situated at the intersection of High and Florence streets. In the month of October of that year Bitzer began the erection of a brick tenement house thereon, with a frontage of 75 feet on High street, and extending back 35 feet on Florence street. The east wall of the building was 2 feet from the west line of High street. He was constructing a cornice or awning, along the High street front, the full length of the building 5½ feet in width, which extended about 3½ feet into the street. The awning was 10 or 11 feet high. Posts were placed along the outer edge to support the superstructure. The city, through its officers, objected to the maintenance of the same in the street, claiming that it was an obstruction. About June 10, 1893, prior to the completion of the building, Nadeau, the street commissioner, acting under the authority of Leverton as mayor, sawed off at the street line, and removed, that portion of the awning, together with the floor or platform, and posts, which extended into the street. While this was being done, Bitzer procured a shotgun, with which he made some demonstrations, when Henry Killion, the marshal, put him under arrest. There is no evidence tending to show that Killion in any way advised, assisted, aided, or abetted in the removal of the obstruction. His only connection, as shown by the evidence, was simply that he arrested Bitzer when he appeared in a threatening manner with a shotgun. There is a total want of evidence to connect Killion with the removal of the structure, so as to make him in any manner liable for the acts done. It is argued Killion made the arrest, and this enabled the workmen to proceed in safety during the absence of Bitzer. The claim that the arrest of Bitzer in some remote manner con-

BITZER

v.

LEVERTON *et al.*

(*Court of Appeals of Kansas, July 18, 1899.*)

Streets and Sidewalks—Obstructions—Summary Removal.*—A city of the second class has a right, through its mayor and street commissioner, to summarily remove unnatural dangerous obstructions from its streets and public highways, without any express authority therefor by an ordinance of such city.

(Syllabus by the Court.)

ERROR by plaintiff from Brown county district court. *Affirmed.*

Ryan & Stuart and *Means & Smith*, for plaintiff in error.

James A. Clark, for defendants in error.

MCELROY, J. This action was brought by Adam Bitzer, in the district court of Brown county, against George W. Leverton and Henry Killion, to recover damages, in the sum of $750, for the wrongful, unlawful, willful, and wanton destruction of property. The defendants answered: (1) General denial; (2) that they were mayor and marshal, respectively, of the city of Horton; (3) denied any unlawful or wrongful destruction of property; (4) averred that all acts done in the premises were performed by Leverton, by virtue of his official position as mayor, for the sole purpose of removing obstructions in the public highways of the city of Horton. A trial was had before the court and jury. The defendant Killion, when plaintiff rested, filed a demurrer to the evidence, which was sustained. The defendant Leverton then introduced his evidence. The trial resulted in a verdict for the defendants, and judgment against plaintiff for costs.

*See Delaware, L. & W. R. Co. *v.* City of Buffalo *et al.* (N. Y.), 1 Mun. Corp. Cas. 507, and *notes*, p. 513 *et seq.*

obstructions in its streets, whether placed there by the city or other parties. It seems to be more in keeping with reason that one should not place awnings or obstructions in the streets or thoroughfares without first procuring permission, than that such obstructions, when placed in the streets, cannot be removed without express authority of an ordinance. It is not only the right, but the duty, of the officers of a city of the second class to remove all unauthorized, unnatural, dangerous obstructions from its traveled streets. The neglect of the officers to perform such duty with reasonable diligence fixes a liability upon the city for all damages sustained in consequence thereof.

The court committed no error in giving or refusing instructions. The issues were fairly presented to the jury in the instructions given. The motion for a new trial was properly overruled. The judgment is affirmed.

TOMPKINS

v.

NORTH HUDSON RY. CO. *et al.*

(*Court of Errors and Appeals of New Jersey, June 28, 1899.*)

Streets and Sidewalks—Depositing Merchandise on Sidewalk.*—Every person occupying lands abutting upon a public street has a right to obstruct the sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose, and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction.

DIXON, GARRISON, and BOGERT, JJ., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff to supreme court. *Reversed in part.*

*See note at end of case.

Tompkins *v.* North Hudson Ry. Co

John I. Weller, for plaintiff in error.

George Holmes, for defendants in error.

GUMMERE, J. Tompkins, the plaintiff, while passing along one of the streets of Hoboken, in front of the door of the stable of the North Hudson Railway Company, was injured by being struck with a bale of hay which was being unloaded from a wagon belonging to the defendant Niver. It appeared from the testimony offered on behalf of the plaintiff that, as he approached the place where the accident happened, he observed that Niver's wagon, loaded with hay, was standing across the sidewalk, backed up to within four or five feet of the stable, and that bales of hay were being unloaded therefrom; that, assuming the process of unloading would be stopped while he went by, he attempted to pass through the space between the rear of the wagon and the front of the stable, and while doing so was struck by one of the bales, which was just then thrown from the wagon by Niver's driver, who was engaged in unloading it. In order to show joint liability on the part of the defendants for the injury received by him, the plaintiff proved that the hay had been purchased by the railway company from Niver; that the wagon had been backed across the sidewalk, in front of the stable door in accordance with instructions from the company, who wished the delivery to be made there for its convenience; and that, immediately upon the unloading of the hay upon the sidewalk, it was removed into the stable by the employees of the company. At the close of the plaintiff's case, the trial judge, considering that the facts clearly showed that the conduct of the plaintiff in attempting to pass between the wagon and the building was negligent, took the case from the jury, and directed a nonsuit to be entered. This judicial action is alleged by the plaintiff to have been erroneous, and we are now asked to set that judgment aside. It seems to us that, whether the act of the plaintiff, in passing through this narrow way, knowing that the hay was being then unloaded upon the sidewalk from the wagon, was

or was not one which a reasonably prudent man would have attempted, was, under the circumstances mentioned, a question of fact to be determined by the jury, rather than one of law to be determined by the court; and that, therefore, the judgment of nonsuit cannot be rested upon the ground upon which it was placed by the trial court. But, notwithstanding this view, it does not follow that there was error in the direction to nonsuit. That direction was right, unless it appears from the proofs that the injuries of the plaintiff resulted from the negligent performance by the defendants of some duty which they owed to him, or some tortious act on their part. So far as the defendant Niver is concerned, we think there was evidence from which a jury might find such a failure of duty. His servant, while unloading the wagon, was bound to take care that persons passing to and fro upon the street were not injured thereby. Under ordinary circumstances, when carefully done, the unloading of a wagon upon a sidewalk can be accomplished without injury to passers-by; and there was nothing in the facts of the case, as presented by the plaintiff, to show that his injuries were received notwithstanding the use of reasonable care by Niver's driver. This being so, the liability of Niver was clearly a question which should have been submitted to the jury. The case against the railway company, however, fails to show any neglect of a duty owing by it to the plaintiff, or any tortious conduct by it contributing to his injury. It took no part in the unloading of the bale from the wagon, and the carelessness of Niver's employee cannot be attributed to the company, for, although it instructed him where to discharge the hay, it did not, by so doing, create the relationship of master and servant between them, nor make itself responsible for his acts in carrying out those instructions. Nor was there anything wrongful in the instructions themselves. The company had a right to have the wagon backed on the sidewalk, temporarily, for the purpose of discharging the hay. Every person occupying lands along the line of a public street has a right to obstruct the

Note

sidewalk in front thereof for a reasonable time in order to move heavy merchandise to or from his premises, provided he does so in such a way as not to interfere with its use by the public to a greater extent than is necessary for the purpose; and does not thereby become bound to furnish to the passer-by a safe passage around the obstruction. Welsh *v.* Wilson, 101 N. Y. 254, 4 N. E. 633. As the company had the legal right to obstruct the sidewalk in front of its stable for the purpose of having the hay delivered, and owed the plaintiff no duty which it failed to perform, there was no error in the direction to nonsuit, so far as it was concerned We conclude that the judgment of nonsuit should be reversed as to the defendant Niver, and affirmed as to the North Hudson Railway Company.

DIXON, GARRISON, and BOGERT, JJ., dissent.

NOTE.

Merchants Using Streets for Depositing Goods.—The portion of the street before their stores may be used by merchants in a reasonable manner for the temporary deposit of merchandise. Welsh *v.* Wilson, 101 N. Y. 254, 12 Am. & Eng. Corp. Cas. 649, 54 Am. Rep. 698; Callanan *v.* Gilman, 107 N. Y. 360, 23 Am. & Eng. Corp. Cas. 59, 1 Am. St. Rep. 831; Halsey *v.* Rapid Tr. St. R. Co., 47 N. J. Eq. 380; Haight *v.* Keokuk, 4 Iowa 214; Manley *v.* Leggett, 62 Hun (N. Y.) 562; Sikes *v.* Manchester, 59 Iowa 65.

In Mathews *v.* Kelsey, 58 Me. 56, 4 Am. Rep. 248, the court said: "As an incident to this right of transit, the public have a right to load and unload such vehicles (in the street or from the street), as they find it convenient to use. But in this respect each individual is restrained by the rights of others. He must do his work in such careful and prudent manner as not to interfere unreasonably with the convenience of others."

And they are under no obligation to furnish a safe passage-way around the obstruction. Welsh *v.* Wilson, *supra*; People *v.* Cunningham, 1 Denio, 530; Com. *v.* Passmore, 1 Serg. & R. 219; People *v.* Horton, 64 N. Y. 610.

CONSOLIDATED WATER CO.

v.

CITY OF SAN DIEGO *et al.*

(*Circuit Court of Appeals, Ninth Circuit, Feb. 6, 1899.*)

Federal Questions—Reasonableness of Water Rates.*—Whether a municipal ordinance fixes the rates to be charged by a water company for water to be furnished the city so unreasonably low as to violate the provisions of the federal constitution which declare that no person shall be deprived of his property without due process of law, and securing to every person the equal protection of the laws, is a federal question.

Parties.—To a suit to have such a question determined, brought by the holder of a water company's bonds against the city it supplies with water, the water company must be a party.

APPEAL by plaintiff from the Circuit Court of the United States for the Southern District of California. *Affirmed.*

John D. Works, *Bradner W. Lee*, and *Lewis R. Works*, for appellant.

H. E. Doolittle, *City Atty.*, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity, brought by the Consolidated Water Company, a corporation of West Virginia, as the holder and owner of certain bonds issued by the San Diego Water Company, a corporation of California (said bonds being secured by a mortgage upon the San Diego Water Company property, which supplies the city of San Diego and its inhabitants with water for domestic and other purposes), against the city of San Diego, the board of aldermen of said city, and the board

Case Stated.

*See Milwaukee Electric R., etc., Co. *v.* City of Milwaukee, 1 Mun. Corp. Cas. 442, and *note* 456, *et seq.*

of delegates of said city. The object of the suit is to obtain a decree of the court declaring null and void an ordinance of the city, enacted in 1896, fixing the rates at which the water supplied by the San Diego Water Company to the city should be furnished, upon the ground that the rates established by the ordinance are so unreasonably low as to amount to a practical taking of the property mortgaged to the complainant, without just compensation, contrary to the provisions of the constitution of the United States. It will be seen that the jurisdiction of the court does not depend upon the diverse citizenship of the parties. A federal question is presented, which gives the court jurisdiction, *viz.* whether the ordinance set out in the bill violates the provisions of the constitution of the United States which declare that no person shall be deprived of his property without due process of law, and securing to every person the equal protection of the laws. The question as to the jurisdiction of the court will not, therefore, be discussed.

Federal Questions—Reasonableness of Water Rates.

The defendants demurred to the bill upon the ground, among others, "that it appears upon the face of the said bill of complaint that the San Diego Water Company is a necessary and indispensable party complainant in this action, but that the San Diego Water Company has not been made a party to this action." The circuit court sustained this ground of the demurrer; and, complainant having declined to amend, the court entered a decree dismissing the bill, and gave judgment in favor of the defendants for their costs. This appeal is taken from that decree, and the sole question presented for our consideration is as to whether or not the court erred in sustaining the demurrer. There has been an elaborate discussion of the various grounds of the demurrer, and a copious citation of authorities upon all the points discussed by counsel. We shall limit the discussion to the ground of demurrer which was sustained by the circuit court.

Upon the facts alleged in the bill, is the San Diego Water Company an indispensable party to the suit? What are the

facts? The bill shows that the title to the property mortgaged to secure the bonds owned by the complainant is in the San Diego Water Company; that the whole amount expended in the construction of its water plant amounted to more than $1,000,000; that it constitutes the only property owned by the San Diego Water Company; that the only means by which said company can make and realize any revenue by which to pay its operating expenses, and for the maintenance of its plant and system, and the interest falling due each year upon the said bonds, and to pay the principal thereof when the same falls due, are the sums which it is entitled to collect for water rates, fixed by the common council of the city of San Diego; that, unless reasonable rates are allowed therefor, neither the said interest nor principal can be paid; that the annual necessary expenses of the San Diego Water Company in the operating and maintenance of its plant, not including either the interest on its bonds or the natural depreciation of its distributing system and plant, commencing July 1, 1896, and ending June 30, 1897, will amount to not less than $50,000; that the amount of interest due the complainant each year on said bonds is the sum of $50,000; that the amount of the annual depreciation of said plant is $40,000; that unless an amount sufficient to pay the said operating expenses, and to replace and make good the loss to said complainant by reason of the natural depreciation, is provided for by rates, the security of the complainant for the payment of the said bonds will be rendered practically valueless; that unless such rates are fixed so as to enable the San Diego Water Company to pay the interest on said bonds, over and above its said operating expenses, and the amount necessary to make good said losses, the complainant will be compelled to lose the interest on the bonds; that in order to pay said operating expenses, and make good said losses, and pay the interest on the bonds, the rates must be so fixed by the said common council as to afford the said company $140,000 per annum; that the distributing system of the said water company is perishable property, and the same will be

required to be replaced at least once in 15 years; that so long as the ordinance (set forth in the bill) remains in force, and the San Diego Water Company is compelled to furnish water thereunder, it will be required and compelled to supply water at a positive loss to itself. And in the prayer of the bill the complainant asks that the city of San Diego, and the common council thereof, be forever enjoined from enforcing said ordinance, as against the San Diego Water Company; that the said city of San Diego and the said common council be enjoined from proceeding against the San Diego Water Company to forfeit its said plant and property, if it should fail and refuse to comply with the terms of the said ordinance; that the said common council be required to immediately pass and adopt another, and legal, ordinance, fixing reasonable and just rates to be charged by the San Diego Water Company for water to be furnished to the said city and its inhabitants.

From this brief reference to the allegations of the bill, it will readily be seen that the San Diego Water Company has an interest in the subject-matter of the suit, and that any decree that might finally be rendered therein would affect its interest. It is certainly interested in obtaining the relief sought for by the complainant, and would doubtless be entitled, in its own behalf, if so disposed, to bring a suit in its own name, and litigate the same question, in a competent court. Its presence is necessary to a full and complete determination of the questions in controversy in this suit. To determine some of the questions raised by the bill as to the reasonableness of the rates fixed by the ordinance, it will involve an investigation of the management of the affairs of the company. In Shields *v.* Barrow, 17 How. 130, 139, indispensable parties are described as "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See, also, Barney *v.*

facts? The bill shows that the title to the property mortgaged to secure the bonds owned by the complainant is in the San Diego Water Company; that the whole amount expended in the construction of its water plant amounted to more than $1,000,000; that it constitutes the only property owned by the San Diego Water Company; that the only means by which said company can make and realize any revenue by which to pay its operating expenses, and for the maintenance of its plant and system, and the interest falling due each year upon the said bonds, and to pay the principal thereof when the same falls due, are the sums which it is entitled to collect for water rates, fixed by the common council of the city of San Diego; that, unless reasonable rates are allowed therefor, neither the said interest nor principal can be paid; that the annual necessary expenses of the San Diego Water Company in the operating and maintenance of its plant, not including either the interest on its bonds or the natural depreciation of its distributing system and plant, commencing July 1, 1896, and ending June 30, 1897, will amount to not less than $50,000; that the amount of interest due the complainant each year on said bonds is the sum of $50,000; that the amount of the annual depreciation of said plant is $40,000; that unless an amount sufficient to pay the said operating expenses, and to replace and make good the loss to said complainant by reason of the natural depreciation, is provided for by rates, the security of the complainant for the payment of the said bonds will be rendered practically valueless; that unless such rates are fixed so as to enable the San Diego Water Company to pay the interest on said bonds, over and above its said operating expenses, and the amount necessary to make good said losses, the complainant will be compelled to lose the interest on the bonds; that in order to pay said operating expenses, and make good said losses, and pay the interest on the bonds, the rates must be so fixed by the said common council as to afford the said company $140,000 per annum; that the distributing system of the said water company is perishable property, and the same will be

parties to a suit in equity who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree. And in a case like the present, where the trial of the suit would necessarily involve the management and conduct of the affairs, and an adjudication of the rights, of the San Diego Water Company, it is essentially necessary that it should be made a party to the suit, either as a plaintiff or a defendant. 1 Fost. Fed. Prac. § 42; Gaylords *v.* Kelshaw, 1 Wall. 81; New Orleans Waterworks Co. *v.* City of New Orleans, 164 U. S. 471, 480, 17 Sup. Ct. 161; Chadbourn *v.* Coe, 45 Fed. 822, 825; Gardner *v.* Brown, 21 Wall. 36, 40; Mallow *v.* Hinde, 12 Wheat. 193, 198; California *v.* Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591.

There is nothing contained in the opinion in the case of Consolidated Water Co. *v.* City of San Diego, 89 Fed. 272, in opposition to the views expressed by the court in overruling the demurrer in the present case. In that case the court said:

"The interest conveyed by such a mortgage vests, in my opinion, in the mortgagee a separate and independent interest, which the mortgagee has a separate and independent right to protect, when unlawfully assailed; taking care, of course, to bring into the suit all necessary parties. Such was the view and the ruling of this court in the case of Consolidated Water Co. *v.* City of San Diego, 84 Fed. 369, and I see no good reason to change them."

Parties.

We are of opinion that upon the facts, and under the principles announced in the authorities we have cited, the San Diego Water Company is not only a necessary, but an indispensable, party to the suit. The court did not err in sustaining the demurrer. The judgment of the circuit court is affirmed.

CITY OF DANVILLE

v.

DANVILLE WATER CO.

(*Supreme Court of Illinois, June 17, 1899.*)

Title of Statute.—The purposes of the act of June 6, 1891, of Illinois, entitled "An act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof", are fully expressed in its title, as the act merely enables such municipalities to exercise such governmental power by delegation, and cannot be applied so as to be, in effect, amendatory of the charter of a water company created under the general corporation laws.

Water Companies—State Powers.*—The state has power to change the rates to be charged by a water company created to serve the public under the general incorporation act, whenever rates previously established have become extortionate.

Water Rates—Subsequent Statute—Obligation of Contracts.—A city, to which the power to fix water rates to be charged by a water company has been given by a statute, may fix lower rates to be charged by such company than those established by an ordinance of the city passed prior to the enactment of such statute without impairing contract obligations.

Municipal Indebtedness—Water Hydrants—Rentals.—The obligation of a city, under an ordinance fixing the reasonable rate of annual rental to be paid by it for water hydrants, does not create that character of indebtedness to pay which the constitution of Illinois requires that a direct annual tax shall be provided at the time of incurring the indebtedness.

Same—Appropriations—Statutes.—Under the revised statutes of Illinois, within the first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation ordinance, a city council may incur any indebtedness not otherwise unlawful, without an appropriation therefor having been previously made.

Claims against Municipal Corporations—Interest.*—In the absence of an express agreement, a municipal corporation is not chargeable with interest on claims against it under a contract.

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*See notes at end of case.

City of Danville *v.* Danville Water Co

ERROR by defendant to circuit court. *Reversed.*

This is a writ of error sued out to reverse the judgment entered in the circuit court of Vermilion county against the plaintiff in error city, in favor of the defendant in error company, in an action of assumpsit. In substance, the declaration recites: That the Danville Water Company is incorporated under the general laws with reference to private corporations, and that the city of Danville is incorporated under general laws with reference to municipal corporations. That on November 11, 1882, the city council passed an ordinance giving the water company the privilege of carrying on the business of supplying the city and its inhabitants with water, and giving it the right to use the streets and alleys for the laying of pipes, etc., which ordinance is set forth in *hæc verba*, and contains provisions as to the details of the work, the locations of hydrants, the rates to private consumers, and other matters, and in section 8 reads: "The city of Danville hereby rents of the Danville Water Company, for the uses hereinafter stated, one hundred fire hydrants, of the character hereinbefore described, for and during the term of thirty years from the passage of this ordinance, * * * and agrees to pay rent for said one hundred hydrants at the rate of $75 each per year, and agrees to pay during the unexpired term of said ordinance and privilege for any additional fire hydrants which the city may hereafter locate, at the rate of $62.50 each per year for the next forty additional hydrants, and for all fire hydrants in excess of one hundred and forty at the rate of $50 each per year." That afterwards, from time to time, by various ordinances, which are also set forth in *hæc verba*, other hydrants were rented for the balance of the term of 30 years, at various prices (from $62.50 to $40 each per annum), until the number reached 158, as follows: Ordinance passed November 11, 1882, 100; June 7, 1883, 1; August 7, 1884, 2; April 1, 1885, 4; June 19, 1890, 5; August 20, 1890, 3,—a total of 115. Ordinance passed September 3, 1891, 3; November 5, 1891, 1; October 20, 1892, 2; June 21,

Case Stated.

1894, 31; October 18, 1894, 6,—a total of 158. That these ordinances make use of this language: "And the city of Danville hereby rents of the Danville Water Company the said additional ——— fire hydrants," etc., "and agrees and binds itself to pay therefor at the rate of ——— dollars per annum"; the blanks being filled with the number and price. That the ordinance of June 21, 1894, makes a reduction in price from $62.50 to $50 for certain hydrants, and from $50 to $40 for future hydrants. That each of the ordinances contained a provision that a written acceptance should be filed within 10 days, and the declaration avers such acceptance. That the plaintiff built its waterworks and made extensions from time to time in pursuance of the terms of said several ordinances. That from August 1, 1895, to November 1, 1895, it supplied water to each of said hydrants, and that, in accordance with the several ordinances, there is due it $2,620.62. That the city promised to pay this, but has neglected, wherefore it brings suit. The plaintiff in error (the defendant below) filed pleas as follows: First Special Plea. As to all except $1,930, parcel of the several sums of money in the declaration mentioned, defendant says that plaintiff was engaged in the public business of supplying water to the city and its inhabitants, and that on January 19, 1895, the city council, under authority of an act approved June 6, 1891 (Laws 1891, p. 85), passed an ordinance known as "Ordinance No. 517," declaring the rents and rates mentioned in the ordinances set forth in the declaration to be unreasonable and oppressive, and fixing the rental for said 158 hydrants at the following rates, which said ordinance declared to be just and reasonable, *viz.* $50 per annum for the first 140 hydrants, and $40 per annum for the next 18 hydrants, making a total of $1,930 for the quarter ending November 1, 1895; that this new rate went into effect May 1, 1895, and the company was duly notified in January, 1895, of the passage of the ordinance, and of an offer of the city to enter its appearance in the circuit court of Vermilion county

at the February term, 1895, if the company should deem the new rate unreasonable,—wherefore the rates for said water so furnished are $1,930, and no greater sum, and this the defendant is willing to pay. Second Special Plea. Is as to all except $1,930, parcel, etc., and is the same in substance as the first, except that it contains the additional allegations that the rates fixed in the original ordinances are now, and were at the time they were fixed, unjust, unreasonable, and excessive, and in excess of the reasonable compensation for said service, and that said rates were voidable at the option of said city, and that the city, by virtue of the statute aforesaid, as well as by virtue of other competent legal authority, passed said Ordinance No. 517, which is set forth in *hæc verba*, wherefore the plaintiff is entitled to receive no greater sum than $1,930. Third Special Plea. As to said $1,930, etc., avers a tender of a city warrant prior to the institution of the suit. Fourth Special Plea. As to the whole cause of action, alleges that neither at the time of the passage of the ordinances mentioned in the amended declaration, nor at any other time before or at the time of creating the indebtedness claimed, was any provision made for the collection of a direct annual tax sufficient to meet the same or any part of said alleged indebtedness as it fell due, in manner and form as required by section 12 of article 9 of the constitution of this state. Fifth Special Plea. As to the whole cause of action, alleges that there was no compliance with section 4 of article 7 of the city and village act, which provides that no contract shall be made by the city council unless an appropriation shall have been previously made concerning such expense. A general demurrer was interposed to each of the special pleas. The court sustained the demurrer to each of the pleas, and the city elected to stand by its pleas. The court entered judgment *nihil dicit*, and assessed the damages at $2,679 and costs (which is $2,620.62, with 5 per cent. interest to date), and entered judgment accordingly, to each of which holdings and judgments the city then and there excepted. The errors assigned are that the court erred

in sustaining a demurrer to the special pleas numbered 1, 2, 4, and 5; the court erred in entering judgment against the defendant; the court erred in entering judgment against the defendant for interest.

G. F. Rearick, City Atty. (*Calhoun & Steely*, of counsel), for plaintiff in error.

W. R. Lawrence and *Remey & Mann*, for defendant in error.

BOGGS, J. (after stating the facts). There is no force in the position that the title to the act of June 6, 1891, which act is relied upon to confer upon the city council authority to adopt the ordinance set forth in pleas Nos. 1 and 2, does not express the subject embraced in the act. The defendant in error is a corporation engaged in an enterprise essentially public in its nature. Its property and its efforts are devoted to a use in which the public has an interest. It was granted corporate existence to enable it to serve the public. It is not a private corporation, but a *quasi* public. The duty devolves upon it to furnish water for reasonable compensation and without unjust discrimination, and the power resides in the state, acting in its sovereign capacity, to enforce the performance of this duty. Water Co. *v.* Fergus, 178 Ill. 571, 53 N. E. 363; City of Danville *v.* Danville Water Co., 178 Ill. 299, 53 N. E. 118. The state, by the enactment of June 6, 1891 (Hurd's Rev. St. 1897, p. 305, par. 267f), selected the corporate authorities of all incorporated cities, towns, and villages, as agencies of the state, to exercise by delegation the power possessed by the state to secure observance and performance of this duty on the part of any corporation having power and authority to supply water to such municipalities or the inhabitants thereof. The act is not amendatory of the charter of the plaintiff in error city or the defendant in error company. It added nothing to the chartered powers of the former, and detracted nothing from such powers of the latter. It merely clothed the city with authority, as the representative

Title of Statute.

of the state, to exercise a governmental power by delegation, —a power which the state could have lawfully exercised directly, had the legislative department deemed that the better course. The purposes of the act are fully embraced within the title, which is, "An act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof." In the case of this plaintiff in error, as appellant, against this defendant in error, as appellee (178 Ill. 299, 53 N. E. 118), the parties presented to this court the question of the legal sufficiency of two pleas identical in every respect with special pleas Nos. 1 and 2 involved in this record. We then ruled that the pleas were not obnoxious to demurrer, but presented legal and sufficient grounds of defense. The principles of law there involved, and the material facts set forth in those pleas, being the same as presented in this record, we must hold, upon the authority of the decision rendered in that case, that the court erred in sustaining the demurrer to the said special pleas Nos. 1 and 2.

It appears from the declaration that the city of Danville, by an ordinance adopted in June, 1894, and but about seven months prior to the adoption of the ordinance of January 19, 1895, and relied upon in the pleas, ordered additional hydrants, fixed reduced rates therefor as compared with the rates established by prior existing ordinances for other hydrants, and provided that the ordinance should not be construed to affect in any way the rates fixed by such prior ordinances for said other hydrants. Counsel argue that this ordinance of June, 1894, recognized that the rates fixed for the rental of hydrants by such prior ordinances were reasonable and acceptable to the city, and that the enactment of the ordinance of January, 1895, within but seven months thereafter, reducing the rentals as fixed by such prior ordinances, and also reducing the rentals as to a portion of the

hydrants authorized to be supplied by the ordinance of June, 1894, is an unreasonable and capricious exercise of any power and authority possessed by the council. Observations of this court in Water Co. *v.* Fergus, 178 Ill., at page 579, 53 N. E. 365, are here in point: Water Companies —State Powers. "A rate or price reasonable and just when fixed may in the future become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. Water Rates—Subsequent Statute—Obligation of Contracts. In the exercise of that power by the state, * * * there is no admixture whatever of any contractual element, nor does the corporation against whom the power is exercised obtain any vested property interest or property right in the scale of rates deemed at any particular time to be reasonable maximum prices for the article to be supplied by the corporation." Moreover, the act investing the city with the power exercised in the adoption of the ordinance of January, 1895, expressly provides that the scale of rates and charges fixed by ordinance, if deemed unreasonable by the water company affected thereby, may be reviewed and determined by the circuit court of the county in which the city or town is situate. It may also be remarked that the ordinance of January, 1895, provided that the rates therein specified should not go into effect until the 1st day of May, 1895, and also that, if the water company desired to submit to the circuit court the question of the reasonableness of the rates as reduced, the corporation counsel of the city should enter the appearance of the city to any such application on the part of the water company, and

should join in submitting the question to the circuit court at the February term thereof.

The court correctly ruled the demurrer to the fourth special plea was well taken. The obligation of a city, under an ordinance fixing the reasonable rate of annual rental to be paid for water hydrants, does not create that character of indebtedness contemplated by section 12 of article 9 of the constitution of 1870, to pay which that section requires that a direct annual tax shall be provided at the time of incurring the indebtedness. Said section of the constitution, in the respect under consideration, has reference to indebtedness, the amount whereof has become fixed and absolute, and the payment thereof deferred to a stated period in the future. Town of Kankakee *v.* McGrew, 178 Ill. 74, 52 N. E. 893. Ordinances enacted for the purpose of regulating the maximum sums to be paid annually for a supply of water do not, within themselves, create any indebtedness, but merely establish, subject to review by the courts, that a greater sum than the rate fixed cannot be lawfully exacted for that commodity.

Municipal Indebtedness—Water Hydrants—Rentals.

The demurrer to the fifth special plea was also properly sustained. Section 4 of article 7 of chapter 24 of the Revised Statutes, entitled "Cities," etc., invoked by the plea as forbidding the enactment of the ordinances involved in the pleadings, must be considered in connection with the preceding sections of the article. So construed, it is manifest that its provisions do not operate to prohibit the incurring of expenses or the making of contracts in all cases, unless an appropriation shall have been previously made concerning such expenses. Section 1 of the article establishes the beginning of the fiscal year of the municipality. Section 2 makes it the duty of the city council to pass a general annual appropriation bill within the first quarter of such fiscal year. The passage of such annual appropriation bill at any time within the first

Same—Appropriations—Statutes.

quarter of the fiscal year answers the demands of the statute. Within that period of first quarter of the fiscal year which may ensue prior to the passage of an annual appropriation bill or ordinance, the city council may enter into any contract and incur any expense not otherwise unlawful, without an appropriation therefor having been previously made, but may include the appropriation therefor in the general appropriation bill to be thereafter enacted within the said first quarter of the fiscal year. Section 4 has the effect to prohibit the incurring of liability or expense during the fiscal year after the passage of the annual appropriation bill, unless the object of the expenditure or liability shall have been incurred within the annual appropriation ordinance, except as to expenditures the necessity whereof is caused by some casualty or accident, within the meaning of the proviso to section 3 of the act. Though denominated "rental of hydrants," that for which the compensation here sought to be recovered was to be made was the water taken from the hydrants during annual periods, and used during the year. The amount of such compensation constituted a necessary annual expense of the city. As to such expenditures, it is only necessary that one appropriation therefor shall be included in the annual appropriation bill. The ordinance adopted in January, 1895, expressly provided that the reduction in the rentals of the hydrants should take effect May 1, 1895. As the fiscal year of the plaintiff in error city, so far as this record discloses, began at the date established by law for the annual election of city officers, *viz.* the third Tuesday in April, the reduced rates related only to the prices to be paid for water taken during the succeeding fiscal year; and the city council had had ample time during the first quarter of such fiscal year to which the ordinance had reference to make an appropriation to cover the cost of the water to be supplied under the terms of that ordinance. Kimble *v.* City of Peoria, 140 Ill. 157, 29 N. E. 723.

It was error to include an award of interest in the judgment. "A municipal corporation, under the uniform ruling of this

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court, is not chargeable with interest on claims against it, in the absence of express agreement therefor; the only exception being where money is wrongfully obtained and illegally withheld by it. See Vider *v.* City of Chicago, 164 Ill. 354, 45 N. E. 720, citing City of Pekin *v.* Reynolds, 31 Ill. 529, and City of Chicago *v.* People, 56 Ill. 327." City of Peoria *v.* Fruin-Bambrick Const. Co., 169 Ill. 36, 48 N. E. 435. For the reasons indicated, the judgment is reversed, and the cause remanded. Reversed and remanded.

Claims against Municipal Corporations—Interest.

CARTWRIGHT, C. J., and CRAIG and PHILLIPS, JJ., dissenting.

NOTES.

Water Companies—Quasi Public Corporations—Fixing Rates.—A corporation organized to supply a municipality with water is subject to the rules of law applicable to other *quasi* public corporations. City Water Co. *v.* State (Tex. Civ. App.) 33 S. W. 259; Foster *v.* Fowler, 60 Pa. St. 27; Olmsted *v.* Morris Aqueduct, 47 N. J. L. 333. And the decision of the United States Supreme Court in Munn *v.* Illinois, 94 U. S. 113, and the cases supplementary thereto, settled the right of a state to regulate the price which may be charged for the use of property when that property is devoted to a public use.

A strong case upon the right of the state to regulate water charges is Spring Valley Water Works Co. *v.* Bartlett (California, 1883, U. S. Circuit Court, 2 Am. & Eng. Corp. Cas. 94). The Spring Valley Water Works was organized under a statute providing that the price of the water furnished to San Francisco and its citizens should be fixed annually by two persons appointed by the city, two by the water company, and one to be chosen by the other four, or, in case they could not agree, by the sheriff of the county. Article 14 of the California constitution, subsequently adopted, changed this mode without the consent of the company, and provided that the price of the water should be fixed annually by the board of supervisors of the city and county alone, giving the company no voice in the matter. *Held*, that such change was not void on the ground of taking private property for public or private use without compensation or without due process of law as conferring the sole power to fix the price upon the purchaser, nor as impairing the obligation of a con-

tract. See also Spring Valley Water Works *v.* Schottler, 2 Am. & Eng. Corp. Cas. 122.

Claims against Municipal Corporations—Interest.—Ordinarily, the same rule in regard to interest on debts applies whether the debtor is an individual or a municipal corporation. See 1 Dill. Mun. Corp. (4th Ed.) 569.

RENO WATER, LAND & LIGHT CO.

v.

OSBURN *et al.*, CITY COUNCIL.

(*Supreme Court of Nevada, April 17, 1899.*)

Contract for Water System—Duty of City Council—Construction of Charter and Statute.*—The city council was not required by law to adopt plans and specifications for a water system before receiving bids for the construction work.

Same—Same.—After the submission of the original proposal of the firm with which the city was about to contract for the construction of a water system when this action was brought to enjoin the city council from taking such step, the council proposed that the bid of the firm should be modified by omitting a portion of the work as first specified. It was shown that such omission would be to the advantage of the city in several respects, and, in the judgment of the council, would save the city an unnecessary expense. *Held*, that no one was entitled to complain of such action on the part of the council.

Appeal—Record—Evidence.—An exhibit containing the original bid of such firm was improperly in the record, as it lacked identification.

Same—Same.—Findings which constituted the written opinion of the trial court mentioned in section 340 of the civil practice act of Nevada were properly in the record.

APPEAL by defendants from Washoe county district court. *Reversed.*

Torreyson & Summerfield, for appellants.

Curler & Curler, *Oscar J. Smith*, and *A. E. Cheney*, for respondent.

*See note at end of case.

Reno Water, Land & Light Co. *v.* Osburn *et al.*, City Council

BELKNAP, J. The city council of the city of Reno submitted the question to the electors whether or not the city should borrow the sum of $150,000 for the purpose of procuring water and the erection of waterworks for the city, and at the same time submitted the question whether or not the city should borrow the sum of $20,000 for the purpose of establishing an electric light plant for lighting the streets and houses of the city. Both questions having been answered in the affirmative, the council caused the following notice to be published: "Bids Wanted. Notice is hereby given that bids will be received until 8 o'clock p. m. of June 13th, 1898, for the purchase of Reno waterworks bonds in the sum of $130,000.00, or any portion thereof not less than $500.00; also, for the purchase of Reno electric light bonds in the sum of twenty thousand ($20,000.00) dollars, or any portion thereof not less than the sum of $500.00; also, written proposals, with plans and specifications, to construct a water system for the city of Reno, to be paid for with bonds of the city of Reno, at not less than their par value; also, for written proposals, with plans and specifications, to construct and establish an electric light plant for the city of Reno, to be paid for with the bonds of the city of Reno at not less than their par value. All bids or proposals should be sealed, so indorsed upon the envelope as to indicate the character of the contents, and directed to 'F. B. Porter, City Clerk, Reno, Nevada.' R. S. Osburn, President City Council. F. B. Porter, City Clerk. Reno, Nevada, May 9th, 1898." Bids and proposals, with plans and specifications, were received, under the notice; and the council, believing that the bid of the firm of Schaw, Ingram, Batcher & Co. was the best, were about to enter into a contract with that firm for a water supply and waterworks, when this suit was commenced for the purpose of enjoining defendants therefrom. Upon the trial a decree was entered perpetually restraining defendants from entering into the proposed contract, and also with the Ft. Wayne Electric Corporation.

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One of the questions presented by the appeal is whether or

not it was the duty of the council to have adopted plans and specifications for a water system before receiving bids. Section 16 of the charter provides that all laws not inconsistent shall remain in full force until otherwise provided. It is claimed, under this provision, that an act passed February 19, 1867 (St. 1867, p. 59), requiring boards of county commissioners, in letting contracts amounting to $500, to advertise and let them to the lowest responsible bidder, and, when plans and specifications are to constitute part of such contract, it shall be stated in the notice where the same may be seen, is applicable to the contract in this case, and that it was the duty of the council, in obedience to this law, to have adopted plans and specifications, and thereafter to have advertised for proposals. The law of 1867 contemplates competitive bidding, and, to secure that end, plans and specifications must be adopted before bids are invited. By the terms of that statute, contracts must be awarded to the lowest responsible bidder. By section 35 of the charter it is provided that, if the council is authorized to issue bonds for water and light purposes, they "shall proceed to publish such fact and invite written proposals with plans and specifications to construct such water system, and the person or corporation offering to provide the best permanent system of water supply for the least number or amount of said bonds, shall be deemed the lowest or best bidder. * * *" These provisions were framed upon a different theory than those governing the statute of 1867. Bidders are required to furnish their own plans and specifications. This requirement can serve no useful purpose, and would not have been inserted in the charter, if contracts were to be awarded upon plans and specifications previously determined by the council. Under provisions requiring proposals to be awarded to the lowest responsible bidder, the board or officer charged with the award has no discretion, except as to the responsibility of the bidder; but the provision of the charter that the bidder offering to furnish the best system of water supply for the least

Contract for Water System—Duty of City Council—Construction of Charter and Statute.

number of bonds shall be deemed the lowest or best bidder commits to the council a discretionary power to determine which system is the best and introduces an element inconsistent with competitive bidding upon plans and specifications previously adopted. In order to determine the best system, comparisons must be made with other systems; but, if all the bids were restricted to one system, it would be impossible for the council to reach any conclusion. We think that the council was not required to adopt plans and specifications before advertising for bids, and this provision of the law of 1867, in this respect, is inconsistent with the charter.

Same—Same.

After the submission of the original proposal, the council, upon consultation with the firm of Schaw, Ingram, Batcher & Co., proposed that the bid of the firm should be modified by omitting the construction of a reservoir, and pipes leading to and from it, and that in consideration thereof the sum of $6,000 should be deducted from the contract price. It was shown that the omission would be to the advantage of the city in several respects. The firm consented to the modification. It was the duty of the council, as agent of the city, to protect and advance its interests. The judgment of the council was that the modification would save the city an unnecessary expense of about $6,000, and improve the proposed water system. Upon these facts, no one can complain of the action of the council.

In the case of the proposed contract with the Ft. Wayne Electric Corporation, it is show by the pleadings that the modifications are unimportant.

Appeal—Record—Evidence.

A motion has been made by respondent to strike from the record an exhibit containing the original bid of Schaw, Ingram, Batcher & Co., filed with the clerk of the city council June 13, 1898, and also the findings of the court, upon the ground that they had not been identified by the trial judge, by his indorsement, as having been read or referred to upon the hearing of the motion for new trial. Aside from the exhibit itself, the testimony of Mr. Osburn satisfactorily shows the difference

between the original bid and its modification by the firm and council. The evidence contained in the exhibits is therefore merely cumulative, but the exhibit, failing of identification, should be stricken out.

The findings mentioned in respondent's notice are the written opinion of the judge mentioned in section 340 of the civil practice act, and are properly in the record. Same—Same. The formal findings referred to in section 182 are different from the written opinion mentioned in section 340. Corbett *v.* Job, 5 Nev. 201. Judgment reversed.

BONNIFIELD, C. J., and MASSEY, J., concur.

NOTE.

Approval of Plans and Specifications for Improvement by City Council.—An assessment for a street improvement will not be vacated because the resolution deciding to make the improvement according to plans to be prepared by the city surveyor, and calling for proposals, was adopted before the plans and specifications for the work were filed, where the plans were filed and approved before adopting the final ordinance providing for the improvement; the statute not requiring a separate approval of the plans and specifications before publishing for bids. Gilmore *v.* City of Utica, (N. Y., Jan. 20, 1892), 29 N. E. Rep. 841.

OLIVER

v.

CITY OF DENVER *et al.*

(*Court of Appeals of Colorado, June 15, 1899.*)

Failure to Light Streets—Whether Negligence.*—Where a city is given power to provide for lighting its streets, but it is not specially required to exercise such power, a failure to light all of its streets cannot be construed as actionable negligence.

Personal Injuries—Obstruction at Side of Pavement—Liability of City.—A complaint alleging, in substance, that personal injuries

*See note at end of case.

were caused by a fall over low railings maintained by an abutting owner at the intersection of two streets, not upon the portion of the constructed sidewalk, but upon a part of the sidewalk area next to the abutting property, not intended for travel, does not state a cause of action against the city.

Width of Sidewalks.*—Where a municipal corporation is not required to maintain a sidewalk of any specific width, it cannot be assumed that it is negligent in providing a sidewalk the portion of which intended for travel is only four feet wide.

Pleading—Joint Liability. — Where a complaint alleges the joint liability of two defendants, if it is defective as to one, it must, on general demurrer, fail as to both.

ERROR by plaintiff to Arapahoe county district court. *Affirmed.*

Betts & Rinkle, for plaintiff in error.

J. M. Ellis and *Guy Le R. Stevick*, for defendant in error the city of Denver.

Thomas H. Hood, for defendant in error Lucy W. S. Jerome.

WILSON, J. This was an action to recover damages for personal injuries claimed to have been received by plaintiff, and to have been caused by the negligence of the defendants in placing and allowing obstructions upon a certain sidewalk in the city of Denver, and in a failure to have the street lighted at the place where the accident occurred. Both the city and Mrs. Jerome, the owner of the premises abutting on the street at the point where the accident occurred, were made defendants. Each of the defendants demurred to the complaint of plaintiff on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff electing to stand by his complaint, judgment was entered in favor of defendants. All that portion of the complaint which it is necessary to consider is as follows: "That the defendant Lucy W. S. Jerome was at the times hereinafter mentioned the owner of certain premises situate at the northeast corner of the intersection of two certain public streets in the city of

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*As to Width of Street, see *note*, 1 Mun. Corp. Cas. 213 *et seq.*

Denver, to wit, Lincoln avenue and Eighteenth avenue, and which said premises abutted upon both said streets, and which said streets were common and public thoroughfares. That for a long time prior to the accident hereinafter set forth, and during more than two years, the said Jerome wrongfully and negligently erected and placed and maintained, or caused to be erected and placed and maintained, at the said northeast corner of the intersection of said two streets next to and adjoining her said premises, and upon the sidewalks of said streets, certain iron guards or railings, about one foot high above the surface of the sidewalk, and extending several feet on each side of the stone walk or flagging at the intersection of said sidewalk, and thereby at said point restricting the use of said sidewalk to the width of the stone flagging, and being four feet; and the said guards or railing so placed were an obstruction to the use of the sidewalk at said point, and rendered and caused the said sidewalk to be and remain in an unsafe and dangerous condition, especially in the nighttime, and was in such condition on the night of October 26, 1895. (4) That the defendant the city of Denver, and its officers and agents, had full knowledge of the unsafe and dangerous condition of said sidewalk, or by the use of ordinary prudence and diligence could have ascertained same, but carelessly and negligently allowed the said sidewalk to be and remain in said unsafe and dangerous condition, and carelessly and negligently allowed the said sidewalk and said street intersection to remain dark and without any light, and has allowed same to be in such condition for several years last past, and same was in such unsafe and dangerous condition, and entirely unlighted and dark, on the night of October 26, 1895, as aforesaid. (5) That the plaintiff on the said night of October 26, 1895, and at about seven p. m. of that day, was lawfully and rightfully traveling and passing on and over said sidewalk at said point, while said sidewalk was dark and unlighted, and in said unsafe and dangerous condition as aforesaid, and was wholly unaware of said obstruction, and, without fault or negligence on his part,

ran against and tripped against and upon, and fell heavily over and upon, said iron guard or railing or obstruction, and upon the stone flagging of the sidewalk, whereby he received great bodily injury, and sustained bruises in and about his head, body, and arms, and one wrist was broken, and he was made sick, sore, and lame for a long time, and unable to attend to or perform his business for about three months, and is still suffering from said injuries so received, and was compelled to expend about $250 for medical attendance and nursing, all to his damage of five thousand ($5,000)."

It will be seen that the negligence of defendants alleged in the complaint, and upon which plaintiff bases his right to recover, is the obstruction of the sidewalk and the failure to light the street at this point. The facts stated show that the alleged obstruction was without the constructed sidewalk; but it is not shown whether it was within, without, or on the line of the sidewalk area, which latter condition might materially affect the duty and corresponding liability of the city. The city charter of Denver gives the city power to provide for lighting its streets, but it nowhere specially requires it to exercise this power. The exercise of the power being discretionary, a failure in this respect cannot be construed as actionable negligence. It would be, of course, a matter of great convenience to have all the streets of cities and incorporated towns well lighted during the night; but as to whether the great expense should or ought to be incurred is a matter which must be determined by the municipal authority, acting, as it conceives, best for the whole municipality. To hold that a municipality is under a legal obligation and duty to provide all of its streets with light would be an unquestioned invasion by the courts of the power and privilege which have been exclusively delegated to the legislative department of the municipality. Where a city assumes to light a street, and does it so imperfectly as to constitute negligence, is another question, and one which is not presented by this complaint. Dill. Mun. Corp. § 1010; City of Freeport *v.* Isbell, 83 Ill.

Failure to Light Streets—Whether Negligence.

440. These remarks apply only to the general duty of the city in reference to lighting its streets. The extent and measure of the duty resting upon a city to require a street opened for travel to be lighted at a point where, from any cause, there is reasonable ground to anticipate danger in its use by persons who are themselves in the exercise of the required care and caution, is not involved in this case, under the facts presented.

With reference to the other acts complained of as constituting actionable negligence, namely, the obstruction of the sidewalk, it will be observed that the facts set forth negative the conclusion. The obstruction, if it was such, was not upon the sidewalk, but at the side of it; and it did not extend, so far as appears from the complaint, over the sidewalk proper, so as to obstruct or impede passage upon it. The city charter nowhere requires the city to maintain a sidewalk of any specific width for the use of pedestrians. This is left to its discretion, and the exercise of such discretion cannot be reviewed judicially, or passed upon by a jury, so long as no distinct legal duty has been violated. It has power to designate what width of sidewalk is necessary in particular localities, and so long as it does not appear that there has been an abuse of discretion, and that the width so designated is clearly insufficient for the purposes of travel, this discretion is not reviewable, and does not constitute actionable negligence. It is a matter of common knowledge in all cities and towns that this discretion is always exercised, and properly so; the same width of walk not being necessary in residence portions as in the business districts. It is true that a town or city is charged with the duty of seeing that all parts of the streets open for travel, including the sidewalks as well as carriageways, are kept in repair; but the general rule is that it performs that duty when the way designated and evidently intended for travel is without obstruction or such structural defects as

Personal Injuries —Obstruction at Side of Pavement —Liability of City.

Width of Sidewalks.

to endanger the safety of travelers in the exercise themselves of ordinary care. These views are well settled and sustained by ample authority. Dill. Mun. Corp. §§ 1003–1008; McArthur *v.* Saginaw, 58 Mich. 357, 25 N. W. 313; Vanderhurst *v.* Tholcke, 113 Cal. 147, 45 Pac. 266; City of Atlanta *v.* Milam, 95 Ga. 135, 22 S. E. 43. In the case at bar it appears from the allegations of the complaint that the paved or flagged way for the use of travelers at the point where this accident occurred was four feet in width, and there is no allegation that this space, which and which alone was manifestly intended for the use of pedestrians, was insufficient, that it was defective in construction, or that there was any obstruction whatever upon it. The only conclusion which can be drawn from the statements of the complaint is that the plaintiff was injured in attempting to step from this portion of the sidewalk area, prepared and plainly provided for the use of foot passengers, to a part of the sidewalk area not intended for foot travel, or that he was crossing from the street to the sidewalk over a portion of the sidewalk area not intended for such foot travel. In either event, he had no right to assume that the way from the sidewalk to the street was smooth and even, but was himself required to exercise a caution and prudence adapted to the nature of the case. Raymond *v.* City of Lowell, 6 Cush. 524; Alline *v.* City of Le Mars, 71 Iowa, 654, 33 N. W. 160.

What we have said is with reference more particularly to what was necessary, under the facts as alleged, to state a cause of action against the city. In this the complaint was defective. It did not set forth such facts as would constitute actionable negligence on its part. We do not intend to say that these views would be applicable if the action were sought to be maintained against the property owner alone, in a case where this would be permissible; but in this case, the complaint alleging a joint liability of the two defendants, if it be defective as to one it must, on general demurrer, fail as to both. Nor do we wish to be understood as holding that

Pleading—Joint Liability.

in no case would the city be liable for injuries received, as complained of in this instance, within the sidewalk area, but without that part of it occupied by the flagging or artificial walk. The extent of the duty of the city as to this area not covered by the constructed walk, in seeing that it was kept free from obstruction to the safe and convenient travel of pedestrians, would depend in some degree upon the uses to which it was set apart, or allowed to be set apart, under the powers granted to the city under its charter, as well as upon the character of the alleged obstruction. The measure of the duty and corresponding liability might also depend upon the fact as to whether the constructed walk was of width sufficient to subserve its purpose, and whether it was at the time and place of the accident in such condition of repair as to furnish easy, safe, and ample facilities for the passage thereon and thereover of pedestrians. And it cannot be said that all of these are matters of defense only, and must be specially pleaded as such. The complaint must contain such allegations of facts as to show upon its face the legal duty of the city, and its liability. In this instance the complaint specifically alleges that the obstructions complained of restricted the use of the sidewalk at that point to the width of the stone flagging. By the construction of an artificial walk, a city invites the travel of pedestrians upon it, and upon it alone. The duty is incumbent upon it to keep this in reasonable repair, but the measure of this duty is quite different from that to keep the remainder of the sidewalk area free from obstructions, and in suitable and safe condition for travel. The city had a right to insist that the complaint advise it specifically what duty it was charged with having neglected. The evident theory of the complaint, and that upon which, under the facts as stated, the plaintiff would be entitled to recover, if at all, is that the artificial walk was of insufficient width; but this is nowhere alleged, as it should have been. A very recent opinion of the New York court of appeals—published since this opinion was written, and rendered in a case which involved a very similar state of facts and the

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identical principles upon which the case at bar turns—supports fully the views which we have expressed. Dougherty *v.* Trustees of Village of Horseheads, 53 N. E. 799.

For these reasons, we think the demurrers were properly sustained, and there being no attempt to amend the complaint, as could have been done, judgment was properly rendered in favor of defendants. Affirmed.

BISSELL, P. J., not sitting.

NOTE.

Duty of Lighting Streets.—Where a city is required by law to light its streets, it is liable for neglect to do so, otherwise, not. Gaskins *v.* Atlanta, 73 Ga. 746; Freeport *v.* Isbell, 83 Ill. 440; Butler *v.* Bangor, 67 Me. 385; Randall *v.* E. R. R., 106 Mass. 171; Noble *v.* Richmond, 31 Gratt. (Va.) 271. But the fact as to whether a street was lighted or not, may have a material bearing on the question of negligence; e. g., in cases where the street would have been perfectly safe if lighted. Miller *v.* St. Paul (Minn.), 36 N. W. Rep. 271. Nor is it incumbent upon a municipality to do so in the absence of a charter or statutory requirement. Canavan *v.* Oil City, 183 Pa. 611, 38 Atl. Rep. 1096; McHugh *v.* St. Paul, 67 Minn. 441, 70 N. W. 5.

YOUNG

v.

CITY OF WEBB CITY.

(*Supreme Court of Missouri, June 6, 1899.*)

Question for Jury.—Where evidence is conflicting, the weight of it is for the consideration of the jury.

Demurrers to Evidence.—A demurrer to evidence admits the truth of every fact proven, and which may be inferred from the testimony.

Sidewalks—Duty to Keep in Repair.*—A municipal corporation is bound to use ordinary care to keep its sidewalks in a reasonably safe condition for the use of pedestrians.

*See *note*, 1 Mun. Corp. Cas. 58.

Young *v.* City of Webb City

Same—Defects—Notice to Municipality.*—A municipal corporation is liable for personal injuries resulting from a defect in one of its sidewalks, of which it had notice, or was chargeable with notice because of the time it had existed before the accident.

Same—Same—Same—Presumptions.†—The fact that a defect has existed in a sidewalk for six weeks prior to an accident warrants the presumption that the city had notice of it in time to have repaired it before the accident.

Instructions.—An instruction to the effect that, if from the evidence, the jury find for plaintiff, in estimating her damages they must take into consideration the physical injury inflicted, does not assume that such injury was inflicted.

APPEAL by defendant from Vernon county circuit court. *Affirmed.*

Frank L. Forlow, for appellant.

L. L. Scott, for respondent.

BURGESS, J. This is an action for damages for personal injuries alleged to have been sustained by plaintiff by a fall occasioned by the defective condition of one of defendant's sidewalks upon which she was walking at the time. The suit was instituted in the circuit court of Jasper county, but the venue was subsequently changed to the circuit court of Vernon county, where, upon a trial to the court and jury, plaintiff recovered a verdict and judgment for $5,000. After unsuccessful motion for a new trial and in arrest, defendant appeals.

Case Stated.

The plaintiff is a married woman, and was at the time of the trial, in December, 1896, 34 years of age, and the mother of six living children and one dead. At the time of the accident she lived in Vernon county, but was visiting relatives, who lived near defendant city. Prior to the accident she had always been a stout healthy woman. On the evening of November 12, 1894, she, in company with her sister, went to Webb City to do some shopping, and while they were walking west on Main street, one of the principal thoroughfares of said city, after dark, plaintiff's foot slipped

*See *notes*, 1 Mun. Corp. Cas. 475.

†See Devenish *v.* City of Spokane (Wash.), 2 Mun. Corp. Cas. 46.

in a hole in the sidewalk, which was constructed of wood, causing her to fall heavily upon the walk, producing an impacted fracture of the right thigh bone.—that is, a fracture of the neck of the thigh bone,—by reason which she was confined to her bed for over six months, suffered great pain always thereafter, the leg being shortened, and the injury permanent. The evidence tended to show that the hole in the sidewalk into which plaintiff stepped had been there for about six weeks prior to the accident. At the close of plaintiff's evidence defendant interposed a demurrer to the evidence, which was denied, and it duly excepted.

At the close of all the evidence, the court, at the instance of plaintiff, over the objection of defendant, instructed the jury as follows: "(1) The court instructs the jury that it is by law made the duty of defendant to keep its sidewalks upon its streets in a reasonably safe condition for the use of pedestrians using the same for travel; and if you shall believe from the evidence that the defendant city permitted its sidewalk on the street and at the place on said street mentioned in plaintiff's petition to become out of repair, and in a dangerous condition for travel, and to so remain in a dangerous condition and out of repair after it knew, or by the exercise of reasonable care and caution could have ascertained, the defective and dangerous condition of said sidewalk, and the plaintiff, while passing along said sidewalk, at the place mentioned in plaintiff's petition, was, on account of said defective and dangerous condition of said sidewalk, without fault or negligence on her part, injured thereby, your verdict should be for the plaintiff. (2) The court instructs the jury that if, from the evidence, they find for the plaintiff, then, in estimating her damages, they will take into consideration the physical injury inflicted, whether temporary or permanent, and the bodily pain and mental anguish endured, if any, by plaintiff; and in assessing her damages you shall assess them at such sum as you shall believe from the evidence will reasonably compensate her for said injury received, together with the suffering caused by

reason of said injury, and in a sum not to exceed twenty thousand dollars, as asked for in plaintiff's petition." And to the decision of the court in giving said instructions, and each of them, defendant then and there at the time excepted.

The following instructions were given at the request of defendant: "(3) The court instructs the jury that, before the duty is placed upon the defendant to keep the sidewalk in reasonably safe condition, it devolves upon the plaintiff to show that said sidewalk was a part of a street that had been dedicated to the public by the owner of the land over which it passes, and said dedication accepted by the city; but such acceptance need not be shown by any formal order of record, but may be shown by such other acts as may show that the defendant recognized and treated the same as one of its streets, or the plaintiff must show that said street has been used by the public for the space of ten years continuously under claim of right that it was a public highway; and, unless the plaintiff has so shown, your verdict will be for the defendant. (4) The court instructs the jury that if the defect in the sidewalk was obvious, and plaintiff, by the exercise of reasonable care, would have observed the same, and they further believe that there was sufficient width of said sidewalk for plaintiff and her sister to walk on and avoid said defect, then plaintiff cannot recover. (5) The court instructs the jury that if they believe from the evidence that the amount sued for by plaintiff is excessive and exorbitant, then they may take that fact into consideration as to the weight to be given her testimony. (6) The court instructs the jury that the ground of plaintiff's suit against this defendant is negligence, and that negligence cannot be presumed, but must be established by the plaintiff to your satisfaction by proof. Therefore, although you may find that the plaintiff was injured by falling on the defendant's sidewalk, yet that fact alone does not entitle plaintiff to recover in this action, but she must show further to your satisfaction by the preponderance—that is, the greater weight—of the evidence that she sustained the injuries com-

plained of as the direct consequence of negligence of the defendant in allowing its sidewalk to be in an unsafe or dangerous condition for persons passing over the same, using ordinary care and prudence, after she had actual or implied notice of such unsafe condition; and, unless the plaintiff has so shown by the evidence, your verdict must be for the defendant. (7) The court instructs the jury that before they can find for the plaintiff they must not only believe from the evidence that the sidewalk, at the place where plaintiff fell, was out of repair, and the defendant had actual or implied notice thereof, but they must further find that by reason thereof that it was not reasonably safe for persons using the same with ordinary care and prudence. (8) The court instructs the jury that the defendant is not an insurer against accidents upon its streets or sidewalks, nor is every defect therein a ground of liability, though it may cause an injury, but the city performs its whole duty if the streets and sidewalks are kept reasonably safe for persons passing over them, using ordinary care and prudence; and, if you believe the sidewalk at the place where plaintiff received her injuries was in such a reasonably safe condition, then the plaintiff cannot recover in this action, and your verdict will be for the defendant. (9) The court instructs the jury that the burden of proof is on the plaintiff, and before she can prevail in this action she must satisfy the jury by the preponderance—that is, the greater weight—of evidence that the sidewalk at the place of the injury was out of repair to such an extent as to render it unsafe or dangerous to persons passing over the same, using ordinary care and prudence, and that defendant had actual or implied notice thereof, and, by reason of said sidewalk being so out of repair, plaintiff was thrown to the ground, and received the injuries complained of; and, unless all the testimony so satisfies you, your verdict must be for the defendant."

It is claimed by defendant that the demurrer which was offered by it at the close of plaintiff's evidence should have been sustained upon the ground, as contended, that the walk

where the accident happened was in good condition until it was broken by a horse, on the 11th day of November, 1894, which was only one day before the accident occurred; and that, as the city did not have actual notice of the defect, the length of time that the street was out of repair before the accident was not sufficient to justify the assumption that it had notice of the defect in time to have repaired the walk before the injury. There is no pretense that the city had actual notice of the defective condition of the sidewalk before the accident, and the only evidence which tended to show that the defect existed for a sufficient length of time to justify the assumption that it did not know of it, or that it might, by the exercise of ordinary diligence, have known of it, before the accident, was that of a witness for plaintiff, by the name of Reed, who testified that he had lived in Webb City for 16 years, was acquainted with Main street where the accident occurred, and that the hole in which plaintiff stepped was about 4 inches wide and 18 inches long and 6 inches deep, and that he saw it there about the last of September or the first of October, 1894. He stated, on cross-examination, that he did not know exactly when the hole was broken, but knew it was there before the 11th of November. A witness for the defendant, by the name of Hilburn, testified that the hole was made after the injury, but he was contradicted by W. W. Hill, another witness for plaintiff, who testified that Hilburn told him that the hole was made before the injury. The evidence being conflicting with respect to the existence of the hole in the sidewalk at the time of the accident, as well, also, as to the length of time that it existed prior thereto, if at all, the weight of it was for the consideration of the jury. Franke *v.* City of St. Louis, 110 Mo. 516, 19 S. W. 938; O'Connell *v.* Railway Co., 106 Mo. 482, 17 S. W. 494; Seckinger *v.* Manufacturing Co., 129 Mo. 590, 31 S. W. 957. A demurrer of this character admits every fact proven, and which may be inferred from the testimony to be true, and should never be sustained unless the evidence, when thus considered,

Question for Jury.

Demurrers to Evidence.

fails to make proof of some essential fact. Bender *v.* Railway Co., 137 Mo. 240, 37 S. W. 132; Rine *v.* Railroad Co., 100 Mo. 228, 12 S. W. 640; Noeniger *v.* Vogt, 88 Mo. 592, and cases cited; Myers *v.* Kansas City, 108 Mo. 480, 18 S. W. 914; Baum *v.* Fryrear, 85 Mo. 151. The evidence not only showed the existence of the hole in the sidewalk at the time of the accident, but it showed that it had existed for about six weeks before that time. It was defendant's duty to exercise ordinary care to keep its streets in a reasonably safe condition for the use of persons walking thereon, and, if it was negligent in so doing, and by reason thereof plaintiff sustained personal injuries, it should be held to respond in damages therefor. It, however, must have had actual notice of the defect before the accident, or it must have existed a sufficient length of time prior thereto to justify the presumption that it did have notice of the defect in time to have repaired it before the accident. As to what length of time would furnish notice to the municipal authorities of such a defect, there is no fixed or definite rule, and each case must depend upon the facts and circumstances attending it. Thus, if the defect existed on a street much traveled and in use, it seems that the duty of the city to the public in looking after its condition required greater diligence in seeing that it was reasonably safe for travel than if it had been but little used. In Maus *v.* City of Springfield, 101 Mo. 613, 14 S. W. 630, it was held that a defect in a street, which had existed for three months, was sufficient to fairly justify the inference that defendant had timely notice of the existence of the defect. In City of Griffin *v.* Johnson, 84 Ga. 279, 10 S. E. 719, evidence that a hole in a bridge on one of the principal streets of a city was permitted to remain from 5 to 20 days was held to be sufficient to charge the city with notice of its existence. In Tice *v.* Bay City, 78 Mich. 209, 44 N. W. 52, it was held that a defect in a sidewalk, which had existed for three months, would justify the presumption that the city had notice of it. So, in City of Philadelphia *v.*

Sidewalks—Duty to Keep in Repair.

Same—Defects—Notice to Municipality.

Smith (Pa. Sup.) 16 Atl. 493, it was held that when a defect in a sidewalk, which was patent, as in the case at bar, had existed for five or six weeks, the jury were warranted in finding that the city had notice of it. The evidence was, we think, sufficient to justify the inference that the defendant city had timely notice of the defect, and to justify the jury in so finding.

Same—Same—Same—Presumptions.

Defendant complains of plaintiff's second instruction in regard to the measure of damages, in that it assumes that physical injuries were inflicted, when that was a contested question. This contention finds no support in the instruction. It does not assume anything. It simply tells the jury that if, from the evidence, they find for plaintiff, in estimating her damages they will take into consideration the physical injury inflicted. They could not, in the first place, have found for plaintiff unless they believed from the evidence that she had sustained physical injury, and it was certainly not error to direct them to take such injuries into consideration in passing upon the case, for it was by them that the damages were to be measured. In passing upon a similar instruction in Chilton *v.* City of St. Joseph, 143 Mo. 192, 44 S. W. 766, BRACE, J., in speaking for the court, said: "It is only necessary to say that the damages were predicated only upon such injuries as were the necessary concomitants and consequence of her misfortune, superinduced by defendant's negligence, and contains no unwarranted assumption, and, in view of the extent of those injuries, is not excessive." This language is peculiarly appropriate to the instruction criticised by defendant, as well, also, as to the amount of the verdict. Finding no reversible error in the record, we affirm the judgment.

Instructions.

GANTT, P. J., and SHERWOOD, J., concur.

OLSON

v.

TOWN OF LUCK.

(*Supreme Court of Wisconsin, April 25, 1899.*)

Exceptions.—Exceptions to the charge of the court must be filed during the trial term, in order that errors may be successfully assigned upon the charge.

Imputable Negligence.—In an action for personal injuries to plaintiff while riding in a vehicle, a question of a special verdict which asks whether plaintiff was guilty of contributory negligence covers the question of the contributory negligence of the driver of the vehicle.

Personal Injuries—Defect in Highway—Evidence of Other Defects.* —In an action against a municipality for personal injuries, claimed to have resulted from defendant's negligence in allowing a large projecting rock to remain in a highway, it was error to admit evidence to prove the general bad condition of the highway, as the question of notice of the defect was not material, it having been a defect in the original construction of the highway, which had existed for many years.

APPEAL by defendant from Polk county circuit court. *Reversed.*

Case Stated.

The plaintiff sued the defendant town for personal injuries sustained by being thrown from a wagon in which she was riding: her fall being caused, as she claims, by the wagon striking a large projecting rock in a highway of the town just at the side of the traveled track. It appeared on the trial that one Stone was driving, and that he and the plaintiff were riding, in a one-horse wagon, when, from some cause, both of them were thrown out, and the horse

*See Lyons *v.* City of Red Wing (Minn.), 1 Mun. Corp. Cas. 483, and *note*, p. 489.

ran away, and left the wagon at a point about a mile and a half further along the highway, and that some parts of the harness and the wagon were broken. The evidence of the defendant tended to show that the rock in question was not as large as claimed by the plaintiff, and not prominent enough to constitute a defect in the highway; and the claim was also made that the accident was the result of a break in the harness occurring while the horse was coming down a hill, just before reaching the rock. A special verdict was returned, by which it was found, in reply to questions, (1) that the defendant was guilty of want of ordinary care in respect to the condition of the highway at the time and place of the accident; (2) that such want of ordinary care was the proximate cause of the plaintiff's injury; (3) that the plaintiff was not guilty of any want of ordinary care that contributed to her injury; and (4) that the plaintiff's damages amounted to $1,300. After argument had been made to the jury, the defendant requested the submission of two additional questions as part of the special verdict; the first of which questions asked the jury whether the driver of the wagon was guilty of contributory negligence, and the second question asked whether such contributory negligence on the part of the driver, coupled with want of ordinary care on the part of the defendant, was the proximate cause of the plaintiff's injury. The submission of both these questions was refused by the court, which stated, as one reason therefor, that the requests came too late, and exceptions were taken to the rulings. The charge of the court is not preserved in the bill of exceptions, with the exception of two detached sentences, and no exceptions were taken to any part of the charge during the trial term. Judgment for the plaintiff was entered upon the verdict, and from this judgment the defendant appeals.

H. P. Burdick, for appellant.
Frank B. Dorothy, for respondent.

WINSLOW, J. (after stating the facts). Inasmuch as no

exceptions to the charge of the court were filed during the trial term, no errors can be successfully assigned upon the charge. Rev. St. § 2869; Cir. Ct. Rule 24, § 3. Nor can we say that it was error to refuse to submit to the jury, as a part of the special verdict, the questions submitted by the defendant as to the alleged contributory negligence of the driver of the horse. Such negligence, if there was any, would, on familiar principles, be imputable to the plaintiff, and, in legal effect, would become her negligence. Ritger *v.* City of Milwaukee, 99 Wis. 190, 74 N. W. 815. So, the question of the verdict, which asks whether the plaintiff was guilty of contributory negligence, would, under proper instructions (which we must assume were given), cover the question of the contributory negligence of the driver of the vehicle.

Exceptions.

Imputable Negligence.

There is, however, one error assigned which, in our opinion, is fatal to the judgment. The plaintiff was allowed to prove, against objection, that the highway between the place of the accident and the place where the wagon was found (a distance of more than a mile) was full of rocks and holes. Of course, the fact that there were other serious defects in the road at other points, at a distance from the alleged defect which caused the accident, can have no legitimate bearing on the question as to whether the projecting stone in question was or was not an actionable defect, but it is manifest that such evidence would be almost certain to have great weight with the jury upon this very question. It is true there are a number of cases in this court holding that, where a defect in a certain sidewalk, bridge, or other similar structure is charged to have caused an injury, evidence of the general bad condition of the same sidewalk, bridge, or structure may be shown, provided the general disrepair proven is of the same general character as the defect in question. Shaw *v.* President, etc., 74 Wis. 105, 42 N. W. 271;

Personal Injuries —Defect in Highway— Evidence of Other Defects.

Barrett *v.* Village of Hammond, 87 Wis. 654, 58 N. W. 1053. In these cases, however, such testimony was not admitted for the purpose of proving negligence or that the defect in question existed, but only for the purpose of proving constructive notice to the corporation of the defect in question, which would be fairly inferable from the existence of many similar defects, resulting from the same general cause, in the same structure. In the present case the projecting stone appears to have been, if a defect at all, a defect in the original construction of the road which had existed for many years, and hence the question of notice was not material, and the principle laid down in the decisions cited does not apply. It was argued that this testimony was admissible for the purpose of showing that the harness was probably broken after the horse ran away, and thus refute the defendant's theory that the harness broke before reaching the stone. The testimony was, however (except in one instance), received generally; and, even were this not the case, we are unwilling to sanction a rule which would place before the jury evidence of this character, which is immaterial on the main question litigated, and so well calculated to induce a verdict founded upon what may be called general principles, rather than upon competent evidence of the defect charged. Such a rule would open up many immaterial issues, and would, we think, be dangerous in the extreme, and tend to hold corporations liable because they had been negligent in distant places, when perhaps there had been no negligence fairly shown at the place of the accident. Judgment reversed, and action remanded for a new trial.

BACON

v.

CITY OF ANTIGO.

(*Supreme Court of Wisconsin, April 25, 1899.*)

Torts—Presentation of Claims.*—A provision of a city charter that a claim for personal injuries must be presented to the common council is complied with by filing the claim with the city clerk for presentation to the council.

APPEAL by plaintiff from Langlade county circuit court. *Reversed.*

W. F. White and *D. G. Classon*, for appellant.
F. J. Finucane and *Max Hoffmann*, for respondent.

WINSLOW, J. The plaintiff brought action against the city for personal injuries suffered on account of a defective sidewalk upon a street in the defendant city, and alleged service of a notice of the injury by filing the same with the city clerk, for presentation to the city council, within 60 days after the injury. Upon the trial, a general demurrer *ore tenus* to the complaint was sustained, on the ground that the complaint did not allege the presentation of the claim to the common council. The charter of the city provides (Laws 1889, c. 197, § 139) that no action in tort shall lie or be maintained against the city, "unless a statement in writing signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and the amount of damages claimed shall be presented to the common council within sixty days after the occurring or happening of the tort alleged." The trial court held that filing the claim with the city clerk for presentation to the council did not satisfy this

*See Seamons *et ux. v.* Fitts, Town Treasurer (R. I.), 1 Mun. Corp. Cas. 465, and *note*, p. 478.

provision. This holding was, we think, erroneous. The city clerk is the custodian of all the papers and records of the city, and required to attend all meetings of the council, and keep a correct record of its proceedings. *Id.* § 58. It is his manifest duty to place before the council all claims of the nature of the one before us which are filed with him for presentation to the council. There is no other orderly way in which a claimant can make sure of presentation of his claim to the council. If he must wait until a meeting of the council is held, and present it in open meeting, he might be denied an opportunity to present it at all, by mere failure of the council to meet; and he might also be denied the full 60 days' time which the statute gives him in which to present it. This view is in accord with the construction given to similar provisions of statute in the cases of Parish *v.* Town of Eden, 62 Wis. 272, 22 N. W. 399, and Mason *v.* City of Ashland, 98 Wis. 540, 74 N. W. 357, although at variance with the holding in Hiner *v.* City of Fond du Lac, 71 Wis. 74, 36 N. W. 632, which latter case must be considered as overruled upon this question. Judgment reversed, and action remanded for a new trial.

LICHTENSTEIN

v.

MAYOR, ALDERMEN, AND COMMONALTY OF CITY OF NEW YORK.

(*Court of Appeals of New York, June 13, 1899.*)

Personal Injuries—Removal of Snow Ridges from Side of Crosswalk.*—The crosswalk over which plaintiff was passing had been shoveled and swept, so that the snow was completely removed, but in doing that ridges had been created on each side, which rendered

*See City of Circleville *v.* Sohn (Ohio), Mun. Corp. Cas. 50, and *note*, p. 51.

Lichtenstein *v.* City of New York

the bed of the street higher than the crosswalk. Plaintiff in avoiding the water from the melting snow accumulated in the crosswalk, slipped upon one of such ridges, and was thereby injured. *Held*, that no negligence could be imputed to the city because of its failure to remove such ridges; and that there could be no recovery.

APPEAL by defendant from First department appellate division supreme court. *Reversed.*

John Whalen and *Theodore Connoly*, for appellant.

George Hahn, for respondent.

O'BRIEN, J. The plaintiff recovered a verdict of $2,000 for a personal injury sustained while crossing Seventy-Ninth street, in the city of New York, on the 8th day of March, 1893. There is no dispute about the main facts upon which the action is based. It appears that the plaintiff, while crossing from one side of the street to the other, upon a crosswalk, slipped and fell, sustaining what is called a "Pott's fracture" of the leg. It is not claimed that the crosswalk itself was out of order, but it appears that considerable snow had fallen during the winter, and some six or seven inches within three or four days prior to the accident. The snow had been shoveled from the crosswalk, and thrown on each side of it into the bed of the street, and, having been packed, formed what are called "ridges" or "banks" on each side of the crossing. These ridges had become hard by thawing and freezing, and were from one to three feet high. The day of the accident was mild, and the ice and snow melted rapidly, and the water from the melting snow and ice collected on the crosswalk between the ridges, forming a pool deep enough to wet the feet when walking on the crossing. In this condition of the street the plaintiff was crossing upon the crosswalk, and, coming to the water, attempted to avoid it by stepping into one of the ridges, when in some way she slipped, and, turning the ankle, sustained the fracture already described.

This case does not involve the liability of the city for allowing ice or snow to accumulate on a sidewalk or a crosswalk, but for allowing it to accumulate in the bed of the

street. The crosswalk over which the plaintiff was passing had been shoveled and swept, so that the snow was completely removed, but in doing that ridges had been created on each side. The accumulation of snow and ice in the bed of the street left the crossing lower than the roadway on each side, and the water from the melting snow and ice naturally accumulated there. If the passenger followed the crossing, the water was a disagreeable, though not a dangerous, obstacle. If she left the crossing and took the bed of the street, the melting snow or ice confronted her. In keeping the sidewalks and crosswalks free from snow or ice, the city authorities must either throw it into the bed of the street or cart it away. In this case they did not draw it away, but threw it into the street on each side of the walk; and, the roadway having in this manner been raised above the crosswalk, the result was the accumulation of water which the plaintiff sought to avoid by stepping on the ridges in the roadway. The question presented by this appeal is whether the city can be made liable for the result of such an accident. It seems to me that it cannot, unless we are prepared to hold that it is the duty of the city to use reasonable care and diligence in removing the snow and ice, not only from the walks, but from the roadbed as well. If it is bound to cart away all the snow that may fall within the limits of the street, within a reasonable time, and not allow any ice or snow to accumulate either on the walks or on the roadway, then it may be that there was a question in this case for the jury; but, if no such duty is imposed upon the city authorities, it is difficult to state any principle or reason upon which this judgment can be upheld. It is scarcely necessary to say that, in the varying and uncertain winter climate of this state, such a measure of diligence on the part of the city authorities would be unreasonable, since it would be impossible to comply with it. The accumulation of ice and snow in the streets of great cities is no doubt a very great inconvenience, but to hold the city liable for the result of every accident arising from such a condition would carry the rule

of responsibility beyond all reasonable limits. The city would practically become an insurer of the individual against all injuries and mishaps in such times. Thus far the liability of a city for accidents caused by slipping on snow or ice has been limited to cases where the obstacle was on the walks generally used by foot passengers. In order to sustain this judgment we must make a very great and important advance, and hold that the defendant was not only bound to keep the walks clear of snow and ice, but the roadway also, or at least that part of it that is so near the walks that a passenger may step upon it when seeking to avoid a pool of water. The contention of the learned counsel for the plaintiff, while not expressed exactly in these words, leads logically to this conclusion. The only negligence that can be imputed to the city is that it failed to remove from the bed of the street the ridges of snow upon which the plaintiff stepped when injured. There is no such duty imposed by the law, in my opinion, upon the authorities of cities. Such a rule of responsibility would be so unreasonable and oppressive that it need not be considered in discussing questions of liability for accidents of this character. The storms of winter in this climate produce conditions on the streets of great cities favorable to the occurrence of such accidents. The individual cannot be insured against all dangers from the elements in the city, any more than in the country; and, when an injury of this kind is caused by an accumulation of ice or snow in the bed of the street, it is simply an accident, for the results of which no one is responsible.

The liability of the city for damages in a case of this character may always be tested by the inquiry whether the accident could fairly or reasonably have been anticipated by the authorities and guarded against. Could any reasonably prudent or careful man have foreseen or anticipated what happened to the plaintiff while crossing the street in question? If not, then the city is not, and ought not to be, liable. Assuming, as we must, that the city is not charge-

able with negligence for omitting to cart away the snow from the roadway, there is no proof of any other defect; and hence there is nothing left for the judgment to rest upon, unless it be claimed that the particular place where it was deposited, with reference to the crosswalk, was improper. The walk to the full width and beyond was cleared so as to make a safe and convenient crossing, but for the accumulation of water caused by the melting of snow and ice on a mild day. It cannot be affirmed with any reason of justice that the authorities were at fault in not anticipating what happened to the plaintiff, and guarding against it. It cannot be said that, in the exercise of a reasonable diligence, they should have foreseen that water would accumulate on the walk, and that to avoid it a traveler in the street was liable to be injured by stepping upon one of the ridges made by the snow when removed from the walk. This would be exacting from the authorities of cities a measure of vigilance and foresight quite impossible, and out of all proportion to any danger to be apprehended from such a cause. It may be safely asserted that the law does not impose any such impossible standard of duty upon municipalities. Harrington *v.* City of Buffalo, 121 N. Y. 147, 24 N. E. 186; Kaveny *v.* City of Troy, 108 N. Y. 571, 15 N. E. 726; Taylor *v.* City of Yonkers, 105 N. Y. 209, 11 N. E. 642; Muller *v.* City of Newburg, 32 Hun, 24 affirmed in 105 N. Y. 668; Beltz *v.* City of Yonkers, 148 N. Y. 67, 42 N. E. 401; Lane *v.* Town of Hancock, 142 N. Y. 510, 37 N. E. 473.

The proof in the case did not warrant a finding of negligence on the part of the defendant, and the motion to dismiss the complaint should have been granted. The judgment should be reversed, and a new trial granted; costs to abide the event.

MARTIN, J. (dissenting). I cannot concur in the conclusion that the evidence in this case was insufficient to justify the submission to the jury of the questions of the defendant's negligence and the plaintiff's freedom from contributory negligence, or that it was insufficient to uphold the verdict.

BACON

v.

CITY OF ANTIGO.

(*Supreme Court of Wisconsin, April 25, 1899.*)

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APPEAL by plaintiff from Langlade county circuit court. *Reversed.*

W. F. White and *D. G. Classon*, for appellant.
F. J. Finucane and *Max Hoffmann*, for respondent.

WINSLOW, J. The plaintiff brought action against the city for personal injuries suffered on account of a defective sidewalk upon a street in the defendant city, and alleged service of a notice of the injury by filing the same with the city clerk, for presentation to the city council, within 60 days after the injury. Upon the trial, a general demurrer *ore tenus* to the complaint was sustained, on the ground that the complaint did not allege the presentation of the claim to the common council. The charter of the city provides (Laws 1889, c. 197, § 139) that no action in tort shall lie or be maintained against the city, "unless a statement in writing signed by the person injured or claiming to be injured, of the wrong and circumstances thereof, and the amount of damages claimed shall be presented to the common council within sixty days after the occurring or happening of the tort alleged." The trial court held that filing the claim with the city clerk for presentation to the council did not satisfy this

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provision. This holding was, we think, erroneous. The city clerk is the custodian of all the papers and records of the city, and required to attend all meetings of the council, and keep a correct record of its proceedings. *Id.* § 58. It is his manifest duty to place before the council all claims of the nature of the one before us which are filed with him for presentation to the council. There is no other orderly way in which a claimant can make sure of presentation of his claim to the council. If he must wait until a meeting of the council is held, and present it in open meeting, he might be denied an opportunity to present it at all, by mere failure of the council to meet; and he might also be denied the full 60 days' time which the statute gives him in which to present it. This view is in accord with the construction given to similar provisions of statute in the cases of Parish *v.* Town of Eden, 62 Wis. 272, 22 N. W. 399, and Mason *v.* City of Ashland, 98 Wis. 540, 74 N. W. 357, although at variance with the holding in Hiner *v.* City of Fond du Lac, 71 Wis. 74, 36 N. W. 632, which latter case must be considered as overruled upon this question. Judgment reversed, and action remanded for a new trial.

LICHTENSTEIN

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with negligence in omitting to repair a defect in a street so slight that no prudent man would reasonably anticipate any danger from its existence. In the Lane Case, which related to a town highway, it was held that, to impose a liability for negligence upon a town, it must be shown that the proximate cause of the injury was an omission upon the part of the commissioner to use ordinary care, under all the circumstances, in the performance of his duties; that is, such care as a reasonable and prudent person would have exercised under those circumstances. These cases fall far short of establishing a doctrine which would justify a reversal of the judgment in this case. The proof was such as to leave no question of doubt but that the city was fully apprised of the situation at that point, or that, in the exercise of reasonable and ordinary inspection, it would have acquired knowledge of its condition. Moreover, if there was any question as to the defendant's knowledge, it was for the jury, and not one of law. Again, when tested by the inquiry whether the accident could fairly or reasonably have been anticipated by the city authorities, it seems quite obvious that any reasonably prudent or careful man must have foreseen that, with a crosswalk covered by a foot of water, persons seeking to cross the street would naturally resort to the ridges upon either side, and that, existing in the condition they were, such an accident would probably follow. I am totally unprepared to concur in the opinion that, as a matter of law, it is not negligence for a great and populous city, upon a prominent and much-used street, to permit its crosswalks to become and remain flooded with a foot of water, with ridges or banks of snow, ice, stones, and dirt upon each side, when, by the discharge of its plain duty to remove obstructions from its gutters, the water would not have accumulated, and the crossing would have been in proper condition for use. Nor do I believe, when the plaintiff was confronted with such a situation, and sought to retreat, but was unable to do so, that it was contributory negligence for her to follow the course of the multitude crossing at that place, by stepping

upon the ridge upon one side of the crossing, thus employing the only means by which she could reasonably hope to reach the place of her destination. The questions of the defendant's negligence and the plaintiff's freedom from contributory negligence were, under the evidence, clearly questions of fact for the jury. How it can be held that the questions whether the plaintiff should have retreated, when the proof shows that it was practically impossible, or whether she should not have followed the course pursued by others who were similarly situated, were questions of law, I cannot comprehend. I think the judgment should be affirmed.

PARKER, C. J., and GRAY and HAIGHT, JJ., concur with O'BRIEN, J., for reversal, etc. BARTLETT and VANN, JJ., concur with MARTIN, J., for affirmance. Judgment reversed, etc.

FROST

v.

CITY OF CASSELTON.

(*Supreme Court of North Dakota, July 10, 1899.*)

Claim for Personal Injuries—Sufficiency of Notice.—Section 2172, Rev. Codes, declares that all claims against cities for injuries received by reason of defective sidewalks, etc., shall within 60 days thereafter be presented to the mayor and council by writing duly verified, "describing the time, place, cause and extent of the damage or injury." The following sections declare that no action can be maintained on account of such injury unless such notice has been given. Plaintiff presented her notice in proper time, definitely and distinctly locating the particular place on the sidewalk where the obstruction existed and the injury was received. At the trial her undisputed evidence located the obstruction and injury 100 feet distant from the designated place. Thereupon plaintiff, by leave, amended her complaint to conform to the proof. Thereupon defendant moved to dismiss the complaint as not based upon any sufficient notice. Motion denied, and the question of the sufficiency of the notice submitted to the jury. *Held* error. The sufficiency of the notice was a question of law for the court, and, as matter of law, such notice was insufficient to sustain the amended complaint.

Frost *v.* City of Casselton

Same — Notice Essential.* — The sections of the statute above mentioned are mandatory, and make the presentation of a proper notice a condition precedent to any recovery.

(Syllabus by the Court.)

APPEAL by defendant from Cass county district court. *Reversed.*

Pollock & Scott, for appellant.
S. B. Bartlett & Benton, *Lovell & Bradley*, for respondent.

BARTHOLOMEW, C. J. Action against a city to recover for personal injuries resulting from a fall occasioned by an alleged obstruction of snow and ice upon the sidewalk. Verdict for plaintiff, new trial denied, judgment upon the verdict, and defendant appeals.

Case Stated.

Section 2172, Rev. Codes, declares: "All claims against cities for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, crosswalk, sidewalk, culvert or bridge of any city, or from the negligence of the city authorities in respect to any such street, crosswalk, sidewalk, culvert or bridge, shall, within sixty days after the happening of such injury or damage, be presented to the mayor and common council of such city by a writing signed by the claimant and properly verified, describing the time, place, cause and extent of the damage or injury." The two following sections make a failure to give the notice as specified an absolute bar to any recovery. A notice was given in this case in due time. It located the obstruction, and consequent fall, upon the sidewalk "in front of the southwest corner of lot seven, block fifteen, First addition to the city of Casselton." Lot 7 is the southwest corner lot in said block. It faces west on Fifth avenue. Third street runs along the south side of lot 7. The notice therefore located the injury at the intersection of these thoroughfares at the southwest corner of said lot 7, and such was the wording of the original complaint. The

*See Seamons *et ux. v.* Fitts, Town Treasurer, 1 Mun. Corp. Cas. 465, and *note*, 478.

undisputed testimony showed that the accident occurred at a point 100 feet north from said corner. At the close of her evidence, plaintiff, by her counsel, asked leave to amend her complaint, to locate the obstruction and injury to correspond with the evidence. This was opposed by defendant upon the ground that it was a departure from the notice. The amendment was allowed. Defendant moved to dismiss the action upon the ground of the insufficiency of the notice, and also moved for a directed verdict upon the same ground. These motions were denied, and the court instructed the jury as follows: "The question here for you to determine is whether the description in the notice was sufficiently accurate to warn the defendant of the locality of the injury, and thus permit it to take such action as the law would require in the premises. To determine this fact, you are to consider the evidence as to the premises, and the nearness or distance of the location, as given in the notice, to the exact place of the injury, and the probability whether the notice, given in the form it was, was sufficient to direct the defendant to the exact location of the injury. If it was not, then you must find for the defendant." To this instruction there was an exception. It will thus be seen that the defendant at all times raised the question of the legal sufficiency of the notice. It is defendant's contention that the sufficiency of the notice was, under the circumstances of the case, purely a question of law, and as matter of law the notice was insufficient. Defendant is clearly correct in both positions. It will be observed that there is no uncertainty or ambiguity in the notice concerning the place where the obstruction existed and the injury occurred. The language describes one place, and describes it so certainly that it necessarily excludes every other place. There is no room for construction, no room for doubt, no room for variation. Where the language used in the notice is of doubtful meaning, and honest minds might differ concerning it (Carr *v.* Ashland, 62 N. H. 665), or where the notice does not purport to locate the place with accuracy, but only generally as between dif-

Claim for Personal Injuries—Sufficiency of Notice.

ferent points (City of Lincoln *v.* O'Brien [Neb.] 77 N. W. 76), or including a considerable extent of highway (Fopper *v.* Town of Wheatland, 59 Wis. 623, 18 N. W. 514), or on a bridge of considerable length (Lyman *v.* Hampshire Co., 138 Mass. 74), it may be proper, under appropriate instructions, to permit the jury to say whether or not the notice given, aided by the inquiries suggested by it, was sufficient to enable the city authorities, acting with reasonable diligence, to locate the point. It was doubtless a consideration of these cases that led the learned trial court to submit the matter to the jury in this case. But such cases can have no application here, for very obvious reasons. No question could arise as to what place the notice described, and intended to describe. In Carr *v.* Ashland, *supra*, the court said: "Whether the exact place where it is claimed the damage was received is sufficiently designated in the notice is a preliminary question of law and fact to be determined by the court." In Law *v.* Fairfield, 46 Vt. 425, a notice that plaintiff "had been injured on the road leading from Fairfield Center to East Fairfield" was held insufficient, as matter of law. In Babcock *v.* Guilford, 47 Vt. 519, notice was held insufficient as to place, as matter of law; also, in Reed *v.* Calais, 48 Vt. 7; Bean *v.* Concord, *Id.* 30; and Holcomb *v.* Danby, 51 Vt. 428. The case of Learned *v.* Mayor, etc. (Sup.) 48 N. Y. Supp. 142, is strictly in point. There the notice alleged that the injury was received on the sidewalk "immediately adjacent numbers 164 and 165, West One Hundred and Thirty-First street." The evidence disclosed that the injury was received in front of Nos. 264 and 266, West 131st street, or just one block distant from the point named in the notice. The trial court dismissed the action for insufficient notice, and plaintiff appealed. The supreme court said: "The notice was misleading, and such as the statute contemplated. To hold it sufficient would defeat the very object of the legislature, which was to protect the municipality from claims like the one made, by enabling its officials to examine the *locus in quo* without delay, obtain witnesses, and make dia-

grams or photographs of the place, to be used in case they determined that the claim ought to be resisted. The statute is mandatory that the notice shall state 'the time and place at which the injuries were received,' and that no action shall be maintained against the municipality unless such notice shall have been given; and such notice is in the nature of a condition precedent to the right of recovery. Reining *v.* City of Buffalo, 102 N. Y. 308, 6 N. E. 792; Curry *v.* Same, 135 N. Y. 366, 32 N. E. 80. Where the language of a statute is definite, and has a precise meaning, it must be presumed to declare the intention of the legislature, and it is not allowable to go elsewhere in search of conjecture to restrict or extend its meaning. Johnson *v.* Railroad Co., 49 N. Y. 455; People *v.* Supervisors of Greene 13 Abb. N. C. 421; Cook *v.* Kelley, 12 Abb. Prac. 35." In that case, also, the complaint correctly stated the locality, but the court said: "A good complaint does not cure a defective notice, when the latter is the foundation upon which the right to maintain the action depends."

Respondent insists, however, that the notice stated that the injury was caused by an obstruction of ice and snow upon the sidewalk, and that such obstruction would locate the place. Under the holding in Laird *v.* Town of Otsego, 90 Wis. 25, 62 N. W. 1042, Brown *v.* Town of Southburg, 53 Conn. 212, 1 Atl. 819, and McCabe *v.* City of Cambridge, 134 Mass. 484, this would be true, if the notice were uncertain, and it appeared from the evidence that there was only one obstruction of ice and snow in that vicinity. Unfortunately for respondent, just the contrary appears. That section had been visited a few days earlier by a snowstorm of almost unprecedented extent and severity. Nearly all the sidewalks in the city were obstructed. Obstruction was then the rule, rather than the exception. But had the officers of the appellant, aided by the notice, sought to find the obstruction, they might with equal propriety have searched in any direction from "the southwest corner of said lot 7." Moreover, the notice was not given for nearly 60 days. Was

it reasonable to suppose that an obstruction of snow and ice could still be identified? But in fact the officers of appellant were under no obligation to go in search of an obstruction. The notice located the obstruction definitely; and if, upon investigation, appellant learned that there was no obstruction at that point at the time of the alleged injury, it was warranted in concluding that respondent was mistaken as to the manner in which she had been injured. We are entirely clear that when respondent amended her complaint, alleging that the injury occurred 100 feet north of the point fixed by the notice, it became the duty of the court to dismiss the complaint, by reason of the defective notice. That the statute requiring that the notice must state the place of the injury is mandatory, and that compliance therewith is a condition precedent to the maintenance of any action, have been often held. In addition to cases already cited, see Underhill *v.* Town of Washington, 46 Vt. 771, where it is said: "The statute is mandatory in form, and declares that no action [in this class of cases] shall hereafter be maintained in any court in this state, unless this preliminary act shall be done within the time specified. The place where the injury occurred is a cardinal and special requirement of the statute, and, if this requirement can be supplied by parol evidence, then may all, and the statute be annulled and utterly disregarded. We think parol evidence not admissible to supply a legal requirement of the written notice." In Sowle *v.* City of Tomah, 81 Wis. 353, 21 N. W. 572, it is said: "It is quite immaterial that some of the city officers were at the place of injury immediately after the accident, and knew precisely where it occurred. The statute does not provide that such knowledge or any other extraneous circumstances will dispense with the necessity of giving the prescribed notice. That must be given in every case coming within the terms of the statute, or the right of action is gone." The judgment of the district court is reversed, and that court is directed to enter a judgment dismissing the complaint. Reversed. All concur.

Same—Notice Essential.

BROADFOOT

v.

CITY OF FAYETTEVILLE.

(*Supreme Court of North Carolina, April 18, 1899.*)

Repeal of Charter—Extinguishment of Debts.*—Debts due by a municipal corporation are not extinguished by a repeal of its charter.

Municipality Liable for Debts of Predecessor.—Where the charter of a municipal corporation is repealed, and a charter is granted to a municipal corporation which includes the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the latter used for public purposes is passed over to the possession and control of the new corporation, without consideration from it, the new municipality is the successor of the old, so as to be liable for its debts.

Same—Statute Impairing Contract Obligations.—Where a successor municipality is liable for the debts of its predecessor, a provision of the act incorporating its prohibiting the levying of taxes for the payment of such debts is null and void; and it has the same power that its predecessor had to assess and collect taxes for such purpose.

Same—Limitations.—The statute of limitations does not run against the debts of a municipal corporation during the period between the repeal of its charter and the incorporation of its successor.

APPEAL by defendant from Cumberland county superior court. *Affirmed.*

N. W. Ray and *H. McD. Robinson*, for appellant.
R. P. Buxton and *J. C. & S. H. MacRae*, for appellee.

MONTGOMERY, J. Under the provisions of an act of the general assembly of the session of 1881, the charter of the town of Fayetteville was surrendered and repealed. At its session 1883, the general assembly created a taxing and police district out of the territory included in the boundaries of the old town of Fayetteville,

Case Stated.

*See note at end of case.

the taxing and police district to be called "Fayetteville." Under the last-mentioned act, all of the property of the former town of Fayetteville was transferred to the custody and control of the board of commissioners appointed by the general assembly. The public buildings, streets, and squares, and the policing of the same, were placed under the charge of those commissioners. Taxes were levied by the general assembly, with a specification as to the purposes to which they were to be applied. The general assembly at its session of 1893 incorporated the inhabitants within the old territory of the town of Fayetteville under the name of the "City of Fayetteville." The plaintiff in 1880 and 1881, being the owner of 52 coupons cut from bonds executed by the town of Fayetteville, presented the same for payment; and, upon payment being refused, brought two actions against the town of Fayetteville to recover the amounts due on the coupons. Judgments were rendered at August term, 1882, of Cumberland superior court in the two actions in favor of the plaintiff; but, between the time of action begun and judgment rendered, the charter of the then defendant, the town of Fayetteville, was surrendered and repealed.

The complaint in the present action embraces three causes of action: The first is founded upon the judgments procured in 1882 by the plaintiff against the town of Fayetteville; the second, upon the coupons themselves upon which the judgments were procured; and the third, upon the plaintiff's alleged right to have the two cases against the town of Fayetteville, which were pending in the superior court of Cumberland county at its August term, 1882, reinstated on the civil issue docket, brought forward and consolidated into one action, and judgment rendered therein for the amount due on the 52 coupons mentioned in those actions. The plaintiff's allegations are that the judgments against the town of Fayetteville, or the coupons, if the judgments are invalid, are still due; that, although the charter of the old town of Fayetteville was repealed and surrendered under the act of 1881, yet the act incorporating the city of Fayetteville

rehabilitated the old town of Fayetteville; and that the city is the successor of the old town, and therefore liable to the plaintiff for the amount of the coupons.

The defendant admits the repeal of the charter of the town of Fayetteville, that the coupons have never been paid, that the judgments were entered against the town of Fayetteville after its charter had been surrendered, and that the inhabitants of the old town have been incorporated by the act of 1893 under the name of the "City of Fayetteville." The defendant avers, however, that the judgments procured by the plaintiff against the town of Fayetteville were void, and denies that the city of Fayetteville is the successor of the old town of Fayetteville, or liable on the coupons or on the judgments.

It is of the first importance, then, to consider whether the city of Fayetteville, the new corporation, chartered by the act of March, 1893, is so far the successor of the town of Fayetteville, the old corporation, as to be liable fo rits debts. If this question is answered in the affirmative, the statutes of limitation set up in the answer as a defense to the action will then have to be discussed and decided. This court at one time adopted the old common-law rule that, upon the civil death of a corporation, the grantors of its real estate took it by reversion, and the debts due to and from it were extinguished. Fox *v.* Horah, 36 N. C. 358. This rule was changed by the court in the case of Wilson *v.* Leary, 120 N. C. 90, 26 S. E. 630, and that of Fox *v.* Horah, *supra*, was overruled. The debt, then, due to the plaintiff by the town of Fayetteville was not extinguished by the repeal of its charter, and still exists, notwithstanding that repeal. Meriwether *v.* Garrett, 102 U. S. 472; Wolff *v.* New Orleans, 103 U. S. 358; Mobile *v.* U. S., 116 U. S. 289, 13 Am. & Eng. Corp. Cas. 337, 6 Sup. Ct. 398; O'Connor *v.* City of Memphis, 6 Lea, 730. Apparently, each corporation created by a separate charter is a distinct entity, and from this it may be

Repeal of Charter—Extinguishment of Debts.

argued with plausibility that no two successive corporations can be connecte , unless they are connected by the terms of the act which created them. But that view must be often only apparently true. If, in the case of a municipal corporation, the old charter should be repealed and a new one granted, and the new one should include the same territory, substantially the same people, and the great mass of the taxable property of the old corporation, and the property of the old corporation used for public purposes be passed over to the possession and control of the new corporation, without consideration from the new corporation, it would be difficult to appreciate how the property and the benefits of the old corporation could be received by the new one, without the shouldering of its responsibility by the new one. It must be that the creditors of a defunct municipal corporation, whose money and property have helped to build up and improve the wealth and influence of the old corporation (although they must submit when a charter is absolutely abolished, and while the old territory and people remain unincorporated), have the right in equity to have a new corporation, embracing the same territory, and the same inhabitants and the same taxable property, considered as the successor of the old, at least so far as its liabilities for the debts of the old corporation are concerned. When the old charter is repealed, and a new one is granted, upon which latter are bestowed by law all the benefits and property of the old, the burden of the old must be borne by the new. Where the benefits are taken, the burdens are assumed. So strong has this view been impressed upon the courts that in O'Connor *v.* City of Memphis, *supra*, the court said: "But in no case have the courts ever failed to declare the identity or succession or continuity of the two corporations, where the same corporators and the same corporate property have passed to the new corporation. The terms of the charter have in such cases never been construed otherwise." The same doctrine was laid down in Mount Pleasant *v.* Beckwith, 100 U. S. 514,

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in Broughton *v.* Pensacola, 93 U. S. 266, in Wolff *v.* New Orleans, and in Mobile *v.* U. S., *supra*. The acts of the legislature repealing the old charters of the cities of Memphis and Mobile, and reincorporating those cities, were passed on the same day; and it might be inferred that these acts were considered as one and the same in legislative intent. But in the case of Amy *v.* Selma, 77 Ala. 103, cited, indorsed, and approved with high commendation by the supreme court of the United States in Mobile *v.* U. S., *supra*, the acts were not simultaneously passed. The repealing act was passed in December, 1882, and the reincorporating act in February, 1883. In that case the supreme court of Alabama held that the act repealing the charter of the city of Fayetteville was without effect or operation upon the liabilities of the city of Selma; that the act of February, incorporating the inhabitants and territory formerly embraced within the limits of the city of Selma, was an organization under the corporate name of Selma of the same corporators, and embraced substantially the same territory as the city of Selma; that Selma was the successor of the city of Selma, and liable for the payment of its debts.

It appears, also, in the case of Broughton *v.* Pensacola, *supra*, that the repeal of the charter of Pensacola was under one act, and the reincorporation of the city under the same name was under a different law. In the case before us 12 years elapsed between the repeal of the charter of the town of Fayetteville and the incorporation of the city of Fayetteville; but we cannot see how that can alter the principle involved in the case. The foundation on which the liability of the new corporation rests, is that the new corporation embraces the same territory, the same corporators, the same taxable property, and has received the property of the old incorporation without consideration; and for these benefits it must, in return, bear the burdens of the old corporation. The liability in such a case commences from the receiving of the benefits, and whether those benefits were received one or ten years, or more, from the repeal of the old charter, makes no difference.

But it is argued for the defendant that, even if the act of 1893 did have the effect to make the city of Fayetteville the successor of the old town of Fayetteville, yet the new corporation was not liable for the debts of the old corporation, but, on the other hand, was expressly prohibited from assuming the debts of the old town or from paying any part of them, except such as were provided for in the act of 1883; and the plaintiff claimed no benefit under that act. The position was without any citation of authority to support it, and to us it did not seem to be sound; and the authorities, so far as they have been examined by us, are all the other way. If the law was as is contended for by the defendant, then it would be in the power of the legislature to destroy the claims of creditors against municipal corporations by simply repealing their charters on one day, and on the next reincorporating the same inhabitants in the same territory, taking care to insert in the repealing acts a provision to the effect that the new corporation should not be liable for the debts of the old. Such legislation would be contrary to every idea of justice and law, and obnoxious to the constitution of the United States, and to that of our own state. In Amy *v.* Selma, *supra*, it appeared that the act incorporating Selma authorized the proper officials to levy taxes, but declared that no funds derived by the corporation from the collection of taxes or from any other source should be used for the payment of any of the debts of the city of Selma, the old corporation; and, as we have seen, the supreme court of Alabama in that case held that the provision was inoperative against the debts and liabilities of the city of Selma, and the supreme court of the United States in Mobile *v.* U. S., *supra*, cited the decision with marked approval.

But the defendant further contends that, even if it should be held by this court that the debts against the town of Fayetteville were not extinguished by the repeal of the town charter, and that they are valid and good against the city of Fayetteville, yet the officials of the new corporation are not only not authorized to levy taxes to pay those debts, but are

prohibited from doing so by the very terms of the act of incorporation, and that "the power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature," as was said in Meriwether *v.* Garrett, *supra*. That is a good proposition of law, and it was applicable to the condition of affairs which appeared in that case, as well as from the view of the law which that court took of the effect of the repeal of the charter of Memphis, and the one creating out of the same territory a taxing district. That court held that the charter of Memphis was absolutely repealed, and treated the case of Meriwether *v.* Garrett upon that view. The effect of the act creating the taxing district was not directly before the court. We have seen that the supreme court of Tennessee in Luehrman *v.* Taxing Dist., 2 Lea, 425, and O'Connor *v.* City of Memphis, 6 Lea, 730, held that the taxing district was a reorganization of the city of Memphis. But the act of the Tennessee legislature, creating the taxing district of Shelby, was a very different act from the act of the North Carolina legislature which created the taxing district of Fayetteville. The former conferred on the officers of the former extensive legislative and judicial powers, and provided that at the end of two years the district should be governed by officers of its own choice. No such powers were conferred on the officers of the taxing district of Fayetteville. But that the power of taxation which is vested in the legislature is such a power as the defendant contends for cannot be maintained. The power is subject to the qualification which attends all state legislation; that is, that it must not be exercised to impair the obligation of contracts, thereby conflicting with the constitution of the United States and that of North Carolina. There is no doubt of the power of the legislature to repeal, out and out, a municipal character; and there is no doubt that, after the application of the property of the defunct corporation not necessary for public uses (public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, and engineering in-

struments, being property necessary for public uses, as is held in Meriwether *v.* Garrett, *supra*, and not subject to the demands of creditors of the corporation) towards the payment of any remaining indebtedness, the debt cannot be enforced, although it is not extinguished. But as long as the charter is not repealed, or, if repealed, the town be rehabilitated so as to become the successor of the old and liable for its debts, the taxing power in the hands of the legislature cannot be used to decrease or impair the rights of the creditor in the enforcement of the collection of the debt. In reference to this matter, it was said in the case of Wolff *v.* New Orleans, *supra*: "This doctrine has been repeatedly asserted by this court when attempts have been made to limit the power of taxation of a municipal body, upon the faith of which contracts have been made, and by means of which alone they could be performed. So long as the corporation continues in existence, the court has said that the control of the legislature over the power of taxation, delegated to it, is restrained to cases where such control does not impair the obligation of contracts made upon a pledge expressly or impliedly given that the power shall be exercised for their fulfillment. However great the control of the legislature over the corporation while it is in existence, it must be exercised in subordination to the principle which secures the inviolability of contracts." The same doctrine is declared in Mobile *v.* U. S., *supra*, and many cases there cited, where it is said: "But when [municipal corporations are] empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are secured by all the guaranties which protect the engagements of private individuals. Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or, if they are changed, a substantial equivalent must be provided.

Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power, and leaves no adequate means for the payment of the bonds, is forbidden by the constitution of the United States, and is null and void."

Now, to apply the law as we have found it to be to the particulars of the case before us: Under what circumstances did the debt of the plaintiff against the town of Fayetteville arise, and what were the means provided, at the time the debt was contracted, for its payment? The Western Railroad was incorporated by the general assembly of North Carolina at its session of 1852, by chapter 147. By an act passed at the same session (chapter 207), the town of Fayetteville was authorized to subscribe for shares of stock in that railroad company, the shares of stock to be held for the use and benefit of the town. To meet the payment of any subscriptions that might be made, the town was authorized to issue and sell bonds bearing interest, and by section 4 to levy and collect taxes for the payment, yearly, of the interest, and to create a sinking fund for the ultimate payment of the debt, and to invest from time to time, in profitable stock, the surplus of their taxes to meet the maturity of the bonds. An election was held according to the provisions of the act, and a majority of the qualified voters cast their ballots for "subscription," and the bonds were issued. On the 22d of March, 1875, the general assembly of that year passed an act (chapter 248) in which the town of Fayetteville was authorized to fund the bonded debt of the town contracted for stock of the Western Railroad Company by virtue of the act of 1852. The debt was funded and the coupons on which this suit was brought are clipped from the bonds issued by the town under the funding act of 1875. It appears, then, from the above statement of the facts, that the bonds were originally issued by the town, with the express provision in the act which authorized their issue (1852) that the town authorities were to levy and collect an annual tax upon the prop-

erty and polls within the town, with which to pay the interest (coupons), and in the same way to raise a sinking fund to pay the bonds at maturity. The act of 1875, authorizing the town to fund the original bonds, provided for the payment of the new bonds in the same manner and to the like extent as were the old bonds. It follows, then, from the conclusion at which we have arrived, aided, as we have been, by the decisions of other courts, that the act of 1852 was the basis of a contract between the holders of the bonds which were issued to buy the stock of the Western Railroad Company, and the town of Fayetteville, by which the town authorities were to levy a tax upon the property and polls of the town, with which to pay the coupons, and also to provide a sinking fund with which to pay the bonds at maturity; that the coupons upon which this suit was brought were clipped from the bonds issued under the act of 1875 under which the old bonds were funded; that the new bonds are of the same nature as the old bonds, and were invested with the same security for their payment; that these bonds are still in force; and that the obligation to pay the same, together with the coupons (the interest), rests upon the city of Fayetteville, as the legal successor of the town of Fayetteville. The provisions in the act of 1893 incorporating the city of Fayetteville, which prohibit the levying of taxes for the payment of the bonds by the new corporation, are invalid, and cannot be regarded. In support of this position, we refer to the case of Mobile *v.* U. S., *supra*. "All laws passed since the making of the contract, whose purpose or effect is to take from the city of Mobile or its successor the power to levy the tax and pay the bonds, are invalid and ineffectual, and will be disregarded;" to Wolff *v.* New Orleans, *supra*, where the court said, "The courts, therefore, treating as invalid and void the legislation abrogating or restricting the power of taxation delegated to the municipality upon the faith of which contracts were made with her, and upon the continuance of which alone they can be enforced, can proceed, and by

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mandamus, compel, at the instance of parties interested, the exercise of that power, as if no legislation had ever been attempted." The conclusion at which we have arrived, as to the liability of the city of Fayetteville, the new corporation, for the debts of the town of Fayetteville, the old corporation, makes it necessary for us to discuss and decide the question of the statute of limitations set up by the defendant in the answer as a bar to the action. The coupons, being for interest to become due on the bonds, are a part of the bonds, and partake of their nature; and the statute of limitations, therefore, which applies to the bonds themselves, must be the same statute which is applicable to the coupons. The bonds are specialties, and so are the coupons. The ten-years statute begins to run against coupons from the time of their maturity. 8 Am. & Eng. Enc. Law, p. 18; Clark *v.* Iowa City, 20 Wall. 583; Amy *v.* Dubuque, 98 U. S. 470; Koshkonog *v.* Burton, 104 U. S. 668. The coupons in this case became due in 1881, the charter of the town of Fayetteville was repealed in October, 1881, the city of Fayetteville was incorporated in March, 1893, and this action was brought in 1894. If the time which elapsed between the repeal of the charter of the town of Fayetteville and the act of 1893 which incorporated the city of Fayetteville, and during which time the territory was a taxing district, is to be counted, then the statute of limitations (ten years) will be a bar to the action; if that time is not to be counted, then the statute will not be a bar to the action. We are of the opinion that the time should not be counted. In Lilly *v.* Taylor, 88 N. C. 489, it was held that, as a result of the repeal of the charter of Fayetteville (and that, too, after the court had taken official knowledge of the act of 1883 creating the taxing district), the creditors of the town had had all remedies for coercing the payment of their debts taken from them; and, by the reference of the court to the case of Meriwether *v.* Garrett, *supra*, as decisive of the case before them, the court could have had no other idea than that the creation of the taxing

district did not in any way or for any purpose revive the old corporation.

But the defendant insists that the statute of limitations began to run against the coupons in 1881, when they fell due, and that more than 10 years elapsed between that time and the time when this action was begun, and that, when the statute once begins to run, no subsequent happening or event can obstruct its course. That, as a general proposition of law, is true; and we have numerous decided cases in our own reports which lay down that rule in the clearest language. In Hamilton *v.* Shepperd, 7 N. C. 115, the plaintiff insisted that his action was not barred because there was fraud in the conduct of the defendant; but the court said: "But it [the matter on which the plaintiff relied to take his case out of the operation of the statute] is not in the act, nor is there anything like it; and we cannot put it there. It is neither in its letter nor spirit." In Vance *v.* Granger's Ex'r, 1 N. C. 204, the court said: "The act of limitation would amount to a general and positive bar, were not certain exceptions contained in the proviso. We cannot add to these others which the legislature has omitted." But we are satisfied that, when these decisions were made, the court had in mind only cases where the ability to bring suit on the part of the plaintiff, or some one for him, had not been taken away by law (by statute), and where the courts were open for the hearing of all matters of which they had jurisdiction. Statutes of limitation are founded on the idea that one who has a cause of action will undertake to enforce it within a reasonable time, if the courts are open to him. To prevent confusion and to produce certainty as to what is reasonable time, the law (the statutes of limitations) has fixed the periods within which actions must be brought. These views are so well expressed in the case of U. S. *v.* Wiley, 11 Wall. 508, that we cannot do better than quote a part of the opinion in that case: "But it is the loss of the ability to sue, rather than the loss of the right, that stops the running of the stat-

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ute. The inability may arise from a suspension of right, or from the closing of the courts; but, whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit. Statutes of limitations are, indeed, statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is therefore defined and allowed. But the basis of the presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have." This view of the law is strengthened by what was said by the court in Hanger *v.* Abbott, 6 Wall. 532: "They [the statutes of limitation] proceed, also, upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period; and they take away all solid ground of complaint, because they rest on the negligence or laches of the party himself." These cases were approved in Braun *v.* Sauerwein, 10 Wall. 218, where it was said: "Similar decisions (referring to Hanger *v.* Abbott, *supra*) have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue by a superior power, without any default of his own; and, therefore, that none of the reasons which induced the enactments of the statutes apply to his case; that, unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

It is unnecessary to consider at any length the effect of the judgment which was entered up against the town of Fayetteville, after the charter of the town of Fayetteville had been repealed. For the purposes of this case, we will treat it as void, as was contended by the defendant. The second cause of action founded on the coupons is good.

In conclusion, we are of the opinion that the city of Fayetteville, the new corporation, is the successor of the town of

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Fayetteville, the old corporation; that the debts of the old corporation were not extinguished by the repeal of its charter; that the same power to assess and collect taxes to pay the plaintiff's claim, which existed at the time that the bonds were issued, is in the new corporation, and has not been affected by the provision in the act incorporating the city of Fayetteville, which prohibits the collection of taxes for the payment of claims like those of the plaintiff; that the statute of limitations did not run during the time when the territory and inhabitants of the territory formerly embraced in the town of Fayetteville was a taxing district, and therefore is not a bar to this action; and that the plaintiff is entitled to a peremptory *mandamus*, requiring the proper authorities of the city of Fayetteville to levy and collect taxes upon property and polls within the city, with which to pay the plaintiff's claim.

Affirmed.

NOTE.

Repeal of Charter—Extinguishment of Debts.—In Mobile *v.* Watson, 116 U. S. 289, 13 Am. & Eng. Corp. Cas. 337, WOODS, J., said:

Where the legislature of the State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body under a new name for the same general purpose, and the great mass of the taxable property of the old corporation is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts; and if any part of the creditors of the old corporation are left without provision for the payment of their claims, they can enforce satisfaction out of the new. In illustration and support of this proposition, the following cases are in point:

In Girard *v.* Philadelphia, 7 Wall. 1, it was held by this court that the annexation to the City of Philadelphia, having a territory of only two square miles, of twenty-eight other municipalities with all their inhabitants, comprising districts, boroughs, and townships of

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various territorial extent, and the changing of its name, did not destroy its identity or impair its right to hold property devised to it.

So in Broughton *v.* Pensacola, 93 U. S. 266, 270, it was said by MR. JUSTICE FIELD, in delivering judgment, that when "a new form is given to an old corporation, or such a corporation is reorganized under a new charter, taking in its new organization the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter and different officers administer its affairs, and, in the absence of express provision for their payment otherwise, it will also be presumed in such case that the legislature intended that the liabilities as well as the rights of property of the corporation in its old form should accompany the corporation in its reorganization."

In O'Connor *v.* Memphis, 6 Lea, 730, the Supreme Court of Tennessee went so far as to say that "neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation if the people and territory reincorporated constitute an integral part of the corporation abolished. ... The corporators and the territory are the essential constituents of the corporation, and rights and liabilities naturally adhere to them."

In Mount Pleasant *v.* Beckwith, 100 U. S. 514, a municipal corporation has been dissolved and its territory divided between and annexed to three adjacent corporations. Upon this state of facts the court held that, unless the legislature otherwise provided, the corporations to which the territory and the inhabitants of the divided corporation had been transferred, were severally liable for their proportionate share of its debts, and were vested with its power to raise revenue wherewith to pay them by levying taxes upon the property transferred and the persons residing therein. See also Colchester *v.* Seaber, 3 Burrow, 1866; Cuddon *v.* Eastwick, 1 Salk. 192; People *v.* Morris, 13 Wend. 325; New Orleans R. Co. *v.* City of New Orleans, 26 La. Ann. 478.

In the case of Amy *v.* Selma (77 Ala. 103), recently decided by the Supreme Court of Alabama, and not yet reported, a question almost identical with the one now in hand was considered. The legislature of Alabama had passed an act, approved December 11, 1882, entitled "An act to vacate and annul the charter and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof."

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That act repealed the charter of the City of Selma and all acts amendatory thereof, and declared the corporation dissolved, and all offices held under any of said acts, except for the purposes and during the period provided by the repealing act, abolished, and that all powers of taxation given to the City of Selma by acts of the legislature were resumed by and lodged in the legislature. It transferred to the custody and control of the State of Alabama all property, real and personal, held and used by the corporation for governmental or other public purposes, and declared that the inhabitants and territory within the territorial limits and jurisdiction of said corporation were resolved into the body of the State. The residue of the act was substantially similar to the act of February 11, 1879, "to vacate and annul the charter and dissolve the corporation of the City of Mobile," etc.

This was followed by an act approved February 17, 1883, "to incorporate the inhabitants and territory formerly embraced within the corporate limits of the municipal corporation, since dissolved, styled the City of Selma, and to establish a local government therefor."

This act, after reciting the dissolution of the City of Selma and the repeal of its charter, among many other provisions, formed the inhabitants residing within the territory formerly covered by the City of Selma into a municipal corporation under the name and style of "Selma;" provided for officers of the municipality and prescribed their duties; authorized them to levy taxes, but declared that no funds derived by the corporation thereby created from taxes or any other source should be used for the payment of any of the debts of the City of Selma, and transferred and made over to Selma the property which had been held and used by the City of Selma, to be held and used for the same uses and trusts to which it had been devoted while in the possession of the City of Selma.

This act was followed by an act approved February 19, 1883, to carry into effect any plan or scheme for the compromise, adjustment, and settlement of the existing indebtedness of the late corporation, known as the City of Selma, which might be agreed upon between the creditors of the said City of Selma and commissioners appointed under and by virtue of the act . . . of December 11, 1882. With this series of acts in force, the Supreme Court of Alabama, in the case mentioned, was called on to construe the act "to vacate and annul the charter and dissolve the corporation of the City of Selma, and to provide for the application of the assets thereof to the payment of the debts thereof." It held that this act was without operation upon the debts and liabilities of the City of Selma lawfully contracted; that the act of February 19, 1883, to incorpo-

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rate the inhabitants and territory formerly embraced within the limits of the City of Selma was a reorganization, under the corporate name of Selma, of the same corporators, and embraced substantially the same territory as the City of Selma; that the corporation called Selma was the successor of the City of Selma, and bound for the payment of its debts; and that a suit at law, founded on a judgment against the City of Selma, was maintainable against its successor, Selma.

This construction of these statutes of the State of Alabama by its highest court being in accord with our own views, and in harmony with former decisions of this court on the same general subject, is decisive of the question in hand, unless there is some material difference between the legislation concerning the City of Selma and that concerning the City of Mobile. The only difference that can be supposed to have any bearing upon the question under discussion is, that the act incorporating Selma embraced the same territory as that covered by the City of Selma, whereas the Port of Mobile covered little more than half the territory embraced by the City of Mobile. We think this difference between the two cases is an immaterial one. The Supreme Court of Alabama, in the case of the Mobile and Spring Hill R. Co. *v.* Kennerly, 74 Ala. 566, assumed that the City of Mobile and the Port of Mobile had substantially the same corporators and the same boundaries. And we are of opinion that the exclusion from the limits of the Port of Mobile of the sparsely settled suburbs of the City of Mobile, a territory of little value, as fairly appears by the record, and consisting, as stated by the counsel for plaintiff, without contradiction, largely of fields, swamps, and land covered with water, will not serve to distinguish this case from the case of Amy *v.* Selma. We repeat, therefore, that in our judgment the Port of Mobile is the legal successor of the City of Mobile, and bound for its debts.

It follows from this proposition that the remedies necessary to the collection of his debt, which the law gave the creditor of the City of Mobile, remain in force against the Port of Mobile. The laws which establish local municipal corporations cannot be altered or repealed so as to invade the constitutional rights of creditors. So far as such corporations are invested with subordinate legislative powers for local purposes, they are the mere instrumentalities of the States, for the convenient administration of their affairs, and are subject to legislative control. But when empowered to take stock in or otherwise aid a railroad company, and they issue their bonds in payment of the stock taken, or to carry out any other authorized contract in aid of the railroad company, they are to that extent to be deemed private corporations, and their obligations are

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secured by all the guarantees which protect the engagements of private individuals. Broughton *v.* Pensacola, 93 U. S. 266; Mount Pleasant *v.* Beckwith, 100 U. S. 514.

Therefore the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature, or, if they are changed, a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void. Von Hoffman *v.* Quincy, 4 Wall. 535; Edwards *v.* Kearzey, 96 U. S. 595; Ralls County Court *v.* United States, 105 U. S. 733; Louisiana *v.* Pillsbury, 105 U. S. 278; Louisiana *v.* Mayor of New Orleans, 109 U. S. 285. These propositions receive strong support from the decisions of the Supreme Court of Alabama. Commissioners of Limestone County *v.* Rather, 48 Ala. 433; Edwards *v.* Williamson, 70 Ala. 145; Slaughter *v.* Mobile County, 73 Ala. 134."

In Port Gibson *v.* Moore, 13 Sm. & Marsh, Rep. 20 Miss. 157, decided in 1849, it was held that the repeal of the charter of an indebted municipal corporation dissolved it, extinguished debts to and from the corporation, and that a subsequent act reincorporating it did not make it liable for a debt existing anterior to the act repealing the charter. This decision is not correct. The court overlooked the constitutional provision protecting contracts from impairment by State legislation. JUDGE DILLON lays down the rule much more accurately thus: "As respects the creditors of a municipal corporation, their rights are protected from legislative intervention by the constitution of the United States, and no repeal of a charter of a municipal corporation can so dissolve it as to destroy its contracts, or, it may probably be safely added, preclude a creditor from recovering his debt." Dillon on Municipal Corporations, sec. 170; Cooley, Const. Lim. 290, 292; Curran *v.* Arkansas, 15 How. (U. S.) 312; Bacon *v.* Robertson, *supra*; 2 Kent, 307, note; Broughton *v.* Pensacola, 93 U. S. 266, 1876; observations of FIELD, J., p. 269; Milner's Admx. *v.* Pensacola, 2 Woods, 32, 642, 1875, quoting text; Indianapolis *v.* Indianapolis Gas Co., Ind. 396, approving text; County Commrs. *v.* Cox, 6 Ind. 403; State *v.* Trustees, 5 Ind. 77; Coulter *v.* Roberson, 24 Miss. 278; Gelpecke *v.* Dubuque, 1 Wall. 175, 1865; Von Hoffman *v.* Quincy, 4 Wall. 535; Welch *v.* Ste. Genevieve, 1 Dillon, C. C. 130; Thompson *v.* Lee County, 3 Wall. 327; Havemeyer *v.* Iowa County, 3 Wall. 294; Butz *v.* Muscatine, 8 Wall. 575; Lansing *v.* Treas., etc., 1 Dillon, C. C. 522; Soutter *v.* Madison, 15

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Wis. 30; Smith *v.* Appleton, 19 Wis. 468; Blake *v.* Railroad Co., 39 N. H. 435. Compare Richmond Gas Light Co. *v.* Middletown, 59 N. Y. 228, 1874, *post*, 692.

There are a good many cases, especially in the Federal courts, adjudicating upon the rights of creditors after the dissolution and reorganization of municipal corporations.

In U. S. *v.* Port of Mobile, 12 Fed. Repr. 768, it was held that a judgment against the Port of Mobile settles all questions as to its liability as the successor of the corporation known as The Mayor, Aldermen, and Common Council of the City of Mobile, and fixes its full and absolute liability to pay the debt as ascertained by the judgment. It was further held in this case that a judgment rendered against a municipality fixes its liability, which will not be affected by a subsequent change of the corporate name and officers, or by placing the outstanding debts and obligations, as well as all assets and property of the corporation, in the hands of commissioners and a court of chancery for litigation and settlement, or by limiting the amount of taxation; and, further, that a judgment against a municipal corporation may be enforced by a *mandamus* against a like corporation to supersede the first. In Morgan *v.* Beloit City and Town, 7 Wall. 613, a city was created out of a town by an act of the legislature which made the city and the town liable proportionately for the indebtedness of the town created before the city and the town were dissolved. *Held*, that the apportionment of this liability between the town and the city would depend upon accounts and computations founded upon the proper assessment rolls which could not be made in an action at law. Hence, a bill in equity was the proper remedy by which to apportion such indebtedness between the two municipalities, especially as authority to tax for the payment of municipal liabilities in cases like this is in the nature of a trust.

In Laramie County *v.* Albany County, 2 Otto, 307, it was held that when a legislature divides or consolidates municipal corporations it may settle the terms and conditions of such division of consolidation, including the apportionment of their debts; and, ordinarily, injustice in apportioning such debts will not invalidate such legislative consolidation or division. In this case, the rule was laid down that when a new county is created out of an old one, the old corporation owns all the public property within its new limits, and is responsible for all debts contracted by it before the act of separation was passed, and must pay such debts without claiming contribution from the new county, which, on its part, can lay no claim to any portion of the public property except what falls

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within its boundaries. In Broughton *v.* Pensacola, 3 Otto, 266, it was held that the property of a dissolved corporation is in equity liable for its debts, and that a municipal corporation issuing bonds is, as to its creditors, a private corporation, and if changed or dissolved or reorganized under a general incorporation law, the new body succeeds to the obligations of the old.

In Mt. Pleasant *v.* Beckwith, 10 Otto, 514, it was held that when municipal bodies are extinguished, reduced, or enlarged, the legislature may apportion the common property and the common burden, and may, as between the parties in interest, settle all the terms and conditions of the division of their territory or the alteration of the boundaries as fixed by any prior law. It was also held in this case that when a portion of a town was annexed to a city by an act requiring that the city "shall assume and pay so much of the indebtedness of the town of Racine as the lands described in the first section of the act may be or become legally chargeable with and liable to pay," the city of Racine thereby became liable for the debts of the extinguished town of Racine in the proportion described. In this case it was also held that when a municipal corporation is merged in another leaving debts unpaid, such debts may be collected by equitable remedies. But in the case of Grantland *v.* Memphis, 12 Fed. Repr., 237, where judgment was recovered against a municipal corporation which was subsequently dissolved and another created in its place, it was held that *scire facias* is the proper proceeding to revive the judgment against its successor. The court took the view that such a case is distinguishable from *scire facias* against an heir to subject him to liability for his ancestor's debt. The heir is not liable for the debt, but only the property in his hands; while the successor of the municipal corporation is liable because it is the same debt or under a different name, and *scire facias* lies against such successor, although equity is administering the assets of the former municipality. In Meriweather *v.* Garrett, 12 Otto, 472, it was held that upon the dissolution of a municipal corporation, property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire-engines, hose, and hose carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Also that the private property of individuals within the limits of a municipal corporation is not liable and cannot be subjected to the payment of the debts of such corporation except through the levy and collection of taxes upon such property. The court proceeded next to lay down a rule as to when courts of equity will lay hold of and apply its property to the payment of the debts

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of a dissolved municipal corporation, namely, the private property of the corporation; that is, such as it held in its own right for profit, or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. But equity cannot, upon the dissolution of a municipal corporation, lay hold of and apply to the payment of its debts property held by it in trust for a private charity, or in trust for the public, such as streets, wharves, cemeteries, hospitals, court-houses, and other public buildings; for in these the corporation has no proprietary right distinct from the trust to the public; nor are taxes previously levied but not collected, on the dissolution of a corporation, such property as a court of equity will lay hold of and apply to the payment of its debts, unless it be taxes which the municipality is under the obligation of a contract to levy and collect. In Milner *v.* Pensacola, 2 Wood, 640, it was held that a State legislature cannot destroy a municipal corporation, or provide the means for its destruction, so as to cancel its existing debts and liabilities. As to legislative apportionment of indebtedness, see also Beckwith *v.* Racine, 7 Biss. 142; Brewiss *v.* Duluth, 3 McCrary, 219.

In County Commrs. *v.* County Commrs., 1 Wy. Ter. 140, it is decided that when a county has been divided by an act of the legislature, one portion thereof retaining the former name, county seat, county organization, county buildings, and all other county property, and the other portion being formed into new counties, the county retaining the old name and organization is responsible for the entire indebtedness of the county at the time of the division, and cannot bring on action for contribution against the counties thus set off, unless specially authorized to do so by the legislature making the division. In U. S. *v.* Memphis, 7 Otto, 284, it was held that wards annexed to a city may be lawfully exempted from payment of taxes with which to enable the city to liquidate debts created before the annexation, the debt in this case being the price of certain pavements which had been laid in the city but not in the wards which were added to it.

See also Shapleigh *v.* San Angelo, 167 U. S. 646; Pacific Improvement Co. *v.* Clarksdale (C. C. A.), 74 Fed. Rep. 528; Cash *v.* Douglasville, 94 Ga. 557; Riley *v.* Garfield Tp., 54 Kan. 463; Smith *v.* Saginaw, 81 Mich. 123; Rumsey *v.* Sank Centre, 59 Minn. 316; Winona *v.* Winona County School Dist., 40 Minn. 13, 3 L. R. A. 46; Blackburn *v.* Oklahoma City, 1 Okla. 292; Guthrie *v.* Oklahoma Territory, 1 Okla. 188, 21 L. R. A. 841; Re Sharon Hill Borough, 140 Pa. 250.

BRISTOL DOOR & LUMBER CO.

v.

CITY OF BRISTOL.

(*Supreme Court of Appeals of Virginia, June 29, 1899.*)

Enjoining Abatement of Nuisance by Municipality.—Equity may restrain the proceedings of a municipal corporation to abate a nuisance, where those proceedings encroach upon private rights, and are productive of irreparable injury.

Municipal Corporations—Power to Abate Nuisances.*—The general powers of a municipal corporation to abate nuisances cannot authorize the extra-judicial condemnation and destruction of that as a nuisance which is not such.

Same — Same — Buildings.† — A municipal corporation has no authority to destroy a building which is private property, and a nuisance only because of the uses to which it is devoted.

APPEAL by plaintiff from corporation court of city of Bristol. *Reversed.*

Rhea & Peters, for appellant.

Bailey, Price & Byars, J. S. Ashworth, J. W. Read, and *W. S. Hamilton*, for appellee.

HARRISON, J. At a regular meeting of the council of the city of Bristol held February 4, 1896, a resolution was adopted declaring a certain building belonging to appellant, known as "Buffum's Stalls," to be a nuisance, and the mayor of the city directed to proceed to have the same abated as such.

Case Stated.

On the 19th day of March, 1896, the mayor of the city informed appellant in writing of the action of the council, and notified it that, unless the building in question was removed in 30 days from March 20, 1896, he would proceed to enforce the ordinance of the city, prescribing a fine of not less that one dollar nor more than twenty dollars for each day

*See Board, etc., Norman *et al.* (La.), 1 Mun. Corp. Cas. 413 and *notes*, p. 418.

†See note at end of case.

the building thereafter remained, and that, in addition thereto, he would have the same removed at the expense of appellant.

On the 20th day of April, 1896, appellant applied to, and obtained from, the judge of the corporation court of the city of Bristol an injunction restraining the execution of the resolution of the city council, which injunction was dissolved by the decree appealed from on the 5th day of April, 1897, and the bill dismissed.

The appellant is a corporation incorporated under the laws of Virginia, and engaged in the manufacture of doors, window sash, moldings, and other house furnishings. About two years before the institution of these proceedings, it purchased, for the purpose of conducting its business, a plant on Williams street, in the city of Bristol. This purchase included a large two-story frame building, situated near the factory, consisting of eight tenements, all under one roof, and containing in all some 40 rooms, used by the owners of the factory for occupation by its employees.

The bill charges that appellant knew nothing of the resolution of the council, and that it had no notice of any character that the city authorities had under consideration the matter of declaring its property a nuisance, and that there was no legal testimony before the council that its property was a nuisance. The bill further charges that said property is not a nuisance; that it in no way endangers the life or health of the citizens of the city; that its occupants are not disorderly or lewd people; that in no respect and for no reason could the same be accounted a public nuisance; and that it is valuable, not only as homes for its employees, but for other purposes, such as storage rooms for lumber, etc.

The appellee demurred to this bill, and in its answer vouched the following section of its charter, defining the powers of the city council, as the authority for its action: "To acquire and compel the abatement of all nuisances within said city at the expense of the person or persons causing the same, or the owner or owners of the ground whereon the same shall be; to prevent and regulate slaughter

houses, soap and candle factories in said city, for the exercise of any dangerous, offensive, or unhealthy business, trade, or employment therein; and to regulate the transportation of coal and other articles through the streets of said city." The answer then alleges, as ground for the resolution complained of, "that appellant had allowed said building to become a nuisance by keeping disorderly and lewd persons therein, by permitting the same to become filthy and unsightly objects; being a constant source of annoyance to all parties residing in their vicinity, and greatly depreciating the value of surrounding property."

The bill states a clear case for the intervention of a court of equity, and the demurrer thereto was properly overruled.

The facts alleged, if true, show that appellant was about to suffer at the hands of appellee an irreparable injury in the destruction of its property. In such cases the law is well settled that courts of equity have jurisdiction to restrain the proceedings of municipal corporations, where those proceedings encroached upon private rights, and are productive of irreparable injury. High Inj. (Ed. 1874) tit. "Municipal Corporations," pp. 463–471; Yates *v.* City of Milwaukee, 10 Wall. 497. In the case cited the bill was filed by the appellant, Yates, to restrain the city of Milwaukee from interfering with his wharf that had been condemned by the city as an obstruction to navigation and a nuisance, and ordered to be abated. The bill was dismissed by the lower court, and upon appeal the supreme court reversed the decision, and entered a decree enjoining the city from interfering with the wharf.

Enjoining Abatement of Nuisance by Municipality.

The exercise of the police power is indispensable to the proper government of all cities, and the safety and protection of its citizens. The limit of that power it would be difficult to define, if, indeed, it could be fixed. There is no doubt, however, that it extends to the protection of the lives, health, morals, and safety of all persons in the community. It is to secure

Municipal Corporations—Power to Abate Nuisances.

and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance; but such power, conferred in general terms, cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation, or use, is not such. 1 Dill. Mun. Corp. (4th Ed.) § 374; Yates *v.* City of Milwaukee, *supra*. In the case last cited MR. JUSTICE MILLER, speaking upon this subject for the supreme court, says: "But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." Numerous authorities of the highest value might be cited to sustain the law as laid down by this learned judge, but it is deemed unnecessary.

The question whether or not appellant's building is such a nuisance as called for its destruction is one of fact, to be determined by the evidence. As already seen, the case stated by appellee in its answer, which is all it attempts to prove, is that disorderly and lewd persons are allowed to occupy the buildings; that they are permitted to become filthy and unsightly objects, being a constant source of annoyance to all parties residing in their vicinity; and that the value of surrounding property is thereby depreciated.

Same—Same—Buildings.

Had these charges been established, the destruction of appellant's property would not have been justified. When a building is a nuisance only because of the uses to which it is devoted, the building itself cannot be pulled down to stop the nuisance, but only the wrongful use can be stopped. 2 Wood, Nuis. § 738. Indeed, it would require a great stretch of judicial power for a court of equity to sanction the abatement of a building as a nuisance when not the building itself, but only its use, constitutes the nuisance. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. It is only necessary to be rid of the persons who use the buildings for an unlawful or improper purpose, and the law affords ample remedies by indictment and otherwise to accomplish this purpose.

In 1 Dill. Mun. Corp. § 376, it is said: "Power to suppress bawdy houses gives the corporation authority, by implication, to adopt by ordinance the proper means to accomplish the end. But power to the common council of a city to make all such by-laws as it may deem expedient for effectually preventing and suppressing houses of ill fame does not authorize the council to decide that a given house is kept for that purpose; nor, if kept for that purpose, does it authorize the council to order it to be demolished; nor, if thus demolished, will it justify the officers of the city who did it in execution of the ordinance and resolution of the council." In a case involving this question the court of appeals of New York said: "A house kept as a house of ill fame, and as a resort for thieves and other disreputable persons, is a public and common nuisance; but the destruction of the building and its furniture is not necessary to its abatement, and is unlawful." Ely *v.* Board, 36 N. Y. 297.

So, when a building is not kept as clean as it should be, in the interest of public health, the remedy for this wrongful use is ample, and a destruction of the building for that reason would be unlawful.

Nor can it justify the destruction of a building that its use diminishes the value of surrounding property. It is not

enough that it renders other property less salable, or that it prevents one from letting his premises for as large a rent as he might otherwise do, or to as responsible or respectable tenants. Nor does the fact that a building is unsightly justify its destruction. There are many unpleasant, and, indeed, offensive, things, that must be borne with by the owners and occupants of estates, because, although offensive to the eye or cultivated taste, they do not trench upon any recognized legal right; and this is the case, even though the thing complained of materially lessens the value of surrounding property. The home of the poor is often unsightly to the eye of those who are able to live in more elegant establishments; but to the humble occupant, who can afford nothing better, it is home. 1 Wood, Nuis. § 3.

We have thus far dealt with the case of the appellee as stated in its answer. The proof fails to sustain the case stated. The evidence in support of the answer is chiefly directed to a period of time prior to the ownership of the property in question by appellant. The weight of evidence to be considered establishes that since appellant became the owner of the building in question it has been occupied by three employees at the factory of appellant, together with their families. These employees are shown to be industrious and faithful men, constantly at work, and earning good wages. The evidence further shows that since appellant became the owner of the building it has not been kept in an unclean condition; nor has it, during that time, been occupied by, or resorted to by, lewd or disorderly persons. The property is separated from all surrounding houses by streets and vacant lots. Without further commenting upon the evidence, it is sufficient to say that it satisfactorily shows that the building in question has been in no sense a nuisance since the ownership of the appellant.

For these reasons the decree appealed from must be reversed, and this court will enter a decree perpetually enjoining the defendant in the court below from executing the resolution in question of the council of the city of Bristol

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directing the destruction of the building of appellant known as "Buffum's Stalls."

RIELY, J., absent.

NOTE.

Nuisances—Power of City to Destroy Property to Abate.—Where a nuisance arises not from the building itself, but from the use to which it is put by the persons who resort thereto, and the city has the power to abate such nuisance otherwise, it cannot cause the building to be destroyed. Miller *et al. v.* Burch, 32 Tex. 208, 5 Am. Rep. 242; Dupree *v.* Mayor, etc., of Brunswick, 82 Ga. 727, 27 Am. & Eng. Corp. Cas. 588; City of Chicago *v.* Union Stock Yards, etc., Co., 164 Ill. 224; Allison *v.* Richmond, 51 Mo. App. 133; New York Health Dept. *v.* Dassori, 21 App. Dev. 348; State *ex rel.* Rodwell *v.* Newark, 34 N. J. L. 264; Barclay *v.* Commonwealth, 25 Pa. 603, 64 Am. Dec. 715; U. S. Illum Co. *v.* Grant, 55 Hun 222; Brightman *v.* Bristol, 65 Me. 426, 20 Am. Rep. 711; Ely *v.* Niagara Co. Sup'rs, 36 N. Y. 297; Nazworthy *v.* Sullivan, 55 Ill. App. 48; Brown *v.* Perkins, 12 Gray 89; Reg. *v.* Pappineau, 1 Strange 686; Moody *v.* Sup'rs, 46 Barb. 659; Clark *v.* Syracuse, 13 Barb. (N. Y.) 32; Welch *v.* Stowell, 2 Doug. (Mich.) 336.

In Gray *v.* Ayres, 7 Dana (Ky.) 375, 32 Am. Dec. 107, MARSHALL, J., delivering the opinion said:

"There is an obvious distinction between a physical or material nuisance, and a nuisance which consists merely in the immoral conduct and illegal practices of individuals within a particular house, and which may be called an unsubstantial or a moral nuisance. The former is properly the subject of direct physical force, and can not be abated or suppressed but by its application; the latter can not be directly reached or affected by external force, and its suppression is more properly the subject of the remedial and vindicatory powers of the law. In attempting to abate a physical or substantial nuisance by force, nothing need be attacked save that which is itself the nuisance, or which can not exist in its present physical condition, without producing a nuisance: while, in attempting by force to abate a moral or unsubstantial nuisance, something substantial must be assailed, the existence of which does not necessarily produce a nuisance; for there is no physical or substantial thing which cannot exist without producing a moral nuisance."

In re CHATHAM ST.

(*Supreme Court of Pennsylvania, May 23, 1899.*)

Change of Street Grade—Injury to Non-Abutting Property—Right to Recover.*—Under the constitution of Pennsylvania damages may be recovered for injury to other than abutting property resulting from a change in a street grade sufficiently near to the property to make the injury proximate, immediate, and substantial.

Same—Same—Drainage.—And where the drainage of non-abutting property is materially and injuriously affected by a change of grade in a distant street there may be a recovery for such injury.

APPEAL by city from Philadelphia county court of common pleas. *Affirmed.*

The assignments of errors referred to by the court presented, in effect, the following questions: "(1) Can damages be recovered for a change of grade of a street, by one whose easement of access thereto is only by a private way from a distant property? If so, then (2) may a property owner improve his building lot at low level, disregarding the existing elevation of the street on which it faces, and depending for drainage upon a circuitous outlet into another, distant street, and then claim damages in respect of his improvements when conditions call for an alteration of the distant street?"

E. Spencer Miller, *Asst. City Sol.*, and *John L. Kinsey*, *City Sol.*, for appellant.

Alfred & Arthur Moore, for appellees.

PER CURIAM. This proceeding, by petition to the court below under the act of May 16, 1891, was for the purpose of assessing damages done to the petitioner's property, fronting on Gaul street, by reason of the change of grade of Chatham street. Prior to said change of grade, petitioner's lots were

*See notes at end of case.

drained through two connecting alleys, appurtenant to said lots, into Chatham street. The elevation of the grade on Chatham street rendered drainage into it impossible, and petitioner was thus compelled to provide other means of drainage. There cannot be any question as to his legal right to compensation, and we cannot say that the amount awarded him is excessive. As to his legal right, etc., it is unnecessary to do more than refer to section 8 of article 16 of the constitution, and the act under which this proceeding was had. The constitutional provision is not limited to property abutting or fronting on the particular highway or improvement, by the construction or enlargement of which the property is injured. It applies to any works, etc., that are sufficiently near to the property to make the injury proximate, immediate, and substantial. Mellor *v.* City of Philadelphia, 160 Pa. St. 614, 28 Atl. 991; *In re* Melon St., 182 Pa. St. 397, 38 Atl. 432; Snyder *v.* City of Lancaster, 20 Wkly. Notes Cas. 185.

Change of Street Grade—Injury to Non-Abutting Property—Right to Recover.

Property is injured when its drainage is materially affected. Railroad Co. *v.* Ziemer, 124 Pa. St. 560, 17 Atl. 187; Chambers *v.* South Chester Borough, 140 Pa. St. 510, 21 Atl. 409. See, also, Patton *v.* City of Philadelphia, 175 Pa. St. 88, 34 Atl. 344, and Dawson *v.* City of Pittsburgh, 159 Pa. St. 317, 28 Atl. 171.

Same—Same—Drainage.

There is nothing in either of the assignments of error that requires special notice. Neither of them is sustained. The decree of the court below, dismissing exceptions to the report of the viewers, and confirming said report, is affirmed, at appellant's costs, and its appeal is dismissed.

NOTES.

Power to Grade Streets.—"That the use of streets for travel may be made safe and convenient, the legislature usually confers upon the municipal authorities the power, in express terms, to graduate and improve them, and supplies the means to carry the power into

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effect by requiring the inhabitants to perform labor upon the streets or to pay specific taxes for that purpose, or taxes that may be so appropriated by the corporation." 2 Dill. Mun. Corp. (4th Ed.), § 685.

Implied Power.—It has been held that a municipal corporation has implied authority to grade and improve its streets. See White *v.* McKeesport, 101 Pa. St. 394; and City of Williamsport *v.* Commonwealth, 84 Pa. St. 487, 24 Am. Rep. 208.

Continuing Power.—The power of a municipality to grade and improve its streets, being a continuing power, is not exhausted by being once exercised. Gaszler *v.* Georgetown, 6 Wheat. (U. S.), 593; New Haven *v.* Sargent, 38 Conn. 50; Markham *v.* Mayor, 23 Ga. 402; Dunham *v.* Hyde Park, 75 Ill. 371; Delphi *v.* Evans, 30 Ind. 99; Macy *v.* Indianapolis, 17 Ind. 267; Coates *v.* Dubuque, 68 Iowa 550; Municipality No. Two *v.* Dunn, 10 La. Ann. 57; Williams *v.* Detroit, 2 Mich. 560; Kaist *v.* St. Paul, etc., R. R. Co., 22 Minn. 118; Hoffman *v.* St. Louis, 15 Mo. 651; Morley *v.* Carpenter, 22 Mo. App. 640; McCormick *v.* Patchen, 53 Mo. 33; Plum *v.* Canal Co., Stockt. (N. J.), 256; *In re* Furnam St., 17 Wend. (N. Y.), 649; *In re* Grube, 81 N. Y. 139; Gall *v.* Cincinnati, 18 Ohio St. 563; O'Connor *v.* Pittsburgh, 18 Pa. St. 187; Adams *v.* Fisher, 75 Tex. 657, 22 Am. & Eng. Corp. Cas. 454.

Discretionary Power.—As to whether or not the power to grade or improve a street should be exercised, the municipality is the judge, and not the courts. Smith *v.* Washington, 20 How. (U. S.), 135; New Haven *v.* Sargent, 38 Conn. 50; Markham *v.* Atlanta, 23 Ga. 402; Dunham *v.* Hyde Park, 75 Ill. 371; Murphy *v.* Peoria, 119 Ill. 509; Delphi *v.* Evans, 36 Ind. 90; Koons *v.* Lucas, 52 Iowa 177; McCormick *v.* Patchen, 53 Mo. 33; Estes *v.* Owen, 90 Mo. 113; Plum *v.* Morris Canal & B. Co., 2 Stockt. (10 N. J. Eq.); *In re* Furnam St., 17 Wend. (N. Y.), 649; Gall *v.* Cincinnati, 18 Ohio St. 563; O'Connor *v.* Pittsburgh, 118 Pa. St. 187.

Establishment of Grade—Illustrations.—In June, 1867, the town council appointed a committee to survey and report a grade for a road or street. In July, 1867, the committee made a report, which the council voted to receive, and also voted that the grade be placed as stated in said report. *Held*, the vote "that the grade be placed as stated in said report" was indicative of approval of such a grade, but it was futile for its establishment, because it gave no direction to the surveyor, which was the only power the council possessed under the statute passed March 9, 1866 (P. L. R. I. c. 634). In May, 1872, the town council directed the surveyor to grade or change the grade of said highway, causing an exact profile of said street and grade to be made and reported to the council. Upon said report, the council ordered notice to the abutting owners, and

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on June 1, 1872, established the grade. The petitioner an abutting owner, was duly notified. In July, 1880, the surveyor, in accordance with the above order, proceeded to change the grade of said highway, and the petitioner, within 40 days after the completion thereof, according to the statute, presented his claim in writing for damages. *Held*, as no grade was made or established under the proceedings had in 1867, it follows that the grade made in 1880 was the first legal and actual grade. Hence, according to Aldrich *v.* Aldermen of Providence, 12 R. I. 241, that "an abutter is not entitled to damages for the establishment of a grade where none has previously existed," the petitioner is not entitled to damages. Gardiner *v.* Town of Johnston (R. I.), 12 Atl. Rep. 888.

Under section 3073, Indiana R. S. 1881, the grade of a street, which can be changed without the assessment and tender of damages occasioned thereby, is a grade established in pursuance of some ordinance or order of the common council involving some general plan of improvement or grading of a street, or specified portion thereof. And such grade, when established, must be approved and adopted, in some way, by the common council, and should be made a matter of record. The record of the survey establishing the grade should appear in the record which the civil engineer is required to keep; and the proceedings of the council should, in some way, either by ordinance or resolution, show that the survey establishing the grade was authorized or approved so as to make it authoritative. Until proceedings are had by the common council, directing that the grade of a certain street, or streets, or specific portions thereof shall be established, or that a grade already established is approved and adopted, in some authoritative way, by the common council, it cannot be deemed that the "city authorities have once established" a grade of a street; and improvements are made by lot-owners subject to the right of the city to establish or change the grade without the assessment or payment of damages. Mattingly *v.* City of Plymouth, 100 Ind. 545; citing Nebraska City *v.* Lampkin, 6 Neb. 27. See also Aurora *v.* Reed, 57 Ill. 29; Yeakle *v.* Lafayette, 48 Ind. 116; Kepple *v.* Keokuk, 61 Iowa 653; Blanden *v.* Ft. Dodge, 102 Iowa 441, 71 N. W. 411; Karst *v.* St. Paul, etc., R. Co., 22 Minn. 118; Oakley *v.* Williamsburgh, 6 Paige (N. Y.) 262; Folkensen *v.* Easton Bor., 116 Pa. St. 523; Hutchinson *v.* Parkersburg, 25 W. Va. 226.

Change of Street Grade—Consequential Damages—Liability of Municipalities.—See Ehrsam *v.* City of Utica, 1 Mun. Corp. Cas. 70, and extensive *note* 73 *et seq.*

Same—Same—Same—Statutory Provisions.—The right to recover consequential damages incident to a change in the grade of a

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street is now, however, in many states secured to property owners by constitutional provision or legislative enactment, especially where the change is made in a grade already established. See Chicago *v.* Taylor, 125 U. S. 161, 22 Am. & Eng. Corp. Cas. 384; Blanchard *v.* Kansas, 16 Fed. Rep. 444; City Council *v.* Maddox, 7 So. 433, 89 Ala. 489; Town of Avondale *v.* McFarlan (Ala.) 13 So. 504; Reardon *v.* San Francisco, 66 Cal. 492, 7 Am. & Eng. Corp. Cas. 454; Healey *v.* New Haven, 49 Conn. 394, 2 Am. & Eng. Corp. Cas. 450; Atlanta *v.* Green, 67 Ga. 386; Elgin *v.* Eaton, 83 Ill. 535, 25 Am. Rep. 412; Columbus *v.* Wooden Mills Co., 33 Ind. 435; Lafayette *v.* Wortman, 107 Ind. 404, 15 Am. & Eng. Corp. Cas. 88; Dalzell *v.* Davenport, 12 Iowa 437; Conklin *v.* Keokuk, 73 Iowa 343; Cole *v.* Muscatine, 14 Iowa 296; Freeland *v.* Muscatine, 9 Iowa 461; Woodbury *v.* Beverly, 153 Mass. 243; Fomald *v.* Boston, 12 Cush. (Mass.) 574; Flagg *v.* Worcester, 13 Gray 601; McCarthy *v.* St. Paul, 22 Minn. 527; Sheehy *v.* Kansas City Cable R. Co., 94 Mo. 574, 32 Am. & Eng. R. Cas. 238; Walker *v.* Sedalia, 74 Mo. App. 70; Carson *v.* City of Springfield, 53 Mo. App. 289; Harvard *v.* Crouch, 66 N. W. 276, 47 Neb. 133; Nebraska City *v.* Lampkin, 6 Neb. 27; Hurford *v.* Omaha, 4 Neb. 336; Harmon *v.* Omaha, 17 Neb. 548, 7 Am. & Eng. Corp. Cas. 474, 52 Am. Rep. 420; Van Riper *v.* Essex Public Road Board, 38 N. J. L. 23; State *v.* Syre, 41 N. J. L. 158; People *v.* Green, 64 N. Y. 605; Pusey *v.* City of Allegheny, 93 Pa. St. 522; Anness *v.* Providence, 13 R. I. 17; Nashville *v.* Nicol, 3 Baxt. (Tenn.) 338; City of Texarkana *v.* Talbot (Tex. Civ. App.) 26 S. W. 451; Crossett *v.* Janesville, 28 Wis. 434; Audet *v.* Quebec, Rap. Jud. Quebec, 9 C. S. 340.

Where Grade Same as Natural Grade.—Statutory and constitutional provisions conferring a right to recover consequential damages incident to changing a street grade apply to a change of grade which was the same as the natural grade. McGar *v.* Borough of Bristol (Conn.), 1 Mun. Corp. Cas. 542; Smith *v.* City of St. Joseph (Mo. Sup.), 27 S. W. 344; City of Kansas (Mo. Sup.), 25 S. W. 225; Davis *v.* Missouri Pac. Ry. Co. (Mo. Sup.), 24 S. W. 777; Fred *v.* Kansas City Cable R. Co. 65 Mo. App. 121; McCall *v.* Saratoga Springs, 56 Hun (N. Y.), 639.

Reducing Street to Established Grade.—Where abutting property has been improved subsequent to the establishment of the street grade, there can be no recovery of consequential damages for injury to such property caused by reducing the street to the established grade. Omaha *v.* Williams, 52 Neb. 40, 71 N. W. 970; McGee *v.* Village of Avondale (Ohio Com. Pl.), W'kly Law Bul. 163.

Same—Improving Property in Ignorance of Established Grade.—At the time the plaintiff purchased and improved his property, the

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grade of the street and sidewalk, on which it abutted, had been established. He neglected to inquire respecting it. *Held*, that he should have known of the established grade, and is not entitled to damages for injuries caused in properly reducing the street to the established grade. Denver *v.* Vernia (Colo., Nov., 1855), 8 Pac. Reptr. 656.

Same—Where No Grade Has Been Fixed.—It has been held that a purchaser of land abutting on a street where some work has been done towards altering the natural grade, but no specific grade has been fixed by the town, may recover damages for further changes made after his purchase. New Brighton *v.* Peirsol, 107 Pa. 280.

Negligence in Performing Work. — Where the grading is done without the exercise of due care or with such gross carelessness as to betoken oppression or malice, the municipality is liable for any injury occasioned by failure to properly perform the work. Shawneetown *v.* Mason, 82 Ill. 337; Bloomington *v.* Brocaw, 77 Ill. 194; North Vernon *v.* Voegler (Ind.), 13 Am. & Eng. Corp. Cas. 434; Ellis *v.* Iowa City, 29 Iowa 229; Rudolphe *v.* New Orleans, 11 La. Ann. 242; Reynolds *v.* Shreveport, 13 La. Ann. 426; Werth *v.* Springfield (Mo.), 6 Am. & Eng. Corp. Cas. 123; Keating *v.* Cincinnati, 38 Ohio St. 141; Rounds *v.* Munford, 2 R. I. 154; Dallas *v.* Cooper (Tex. Civ. App.), 54 S. W. 321; Smith *v.* Alexandria, 33 Gratt. (Va.), 208; Brighouse *v.* City of New Westminster (Can.), 38 Am. & Eng. Corp. Cas. 315.

Failure to Comply with Statutory Requirements.—In the absence of the statutory preliminaries a municipality has no greater right than any other owner of adjacent land to injure abutting property in grading a street; and damages may be recovered in an action against a municipal corporation for the consequences of such an unauthorized action. Paine *v.* Lettsville, 103 Iowa 481, 72 N. W. 693; Blanden *v.* Ft. Dodge, 102 Iowa 441, 71 N. W. 411; Henderson *v.* Mayor, etc., of Baltimore, 8 Md. 352; Thomson *v.* Boonville, 61 Mo. 282; Hawthorn *v.* East Portland, 13 Oregon 271, 12 Am. & Eng. Corp. Cas. 525; Drummond *v.* City of Eau Claire (Wis.) 55 N. W. 1028, 85 Wis. 556; Brighouse *v.* City of New Westminster (Can.), 38 Am. & Eng. Corp. Cas. 315.

Lateral Support.—If in the lawful process of repairing or grading a street, the walls of a dwelling-house or other building lose their support and in consequence fall, the owner cannot recover damages provided due care has been used. He has, and can acquire, by mere prescription no right to lateral support. Transportation Co. *v.* Chicago, 99 U. S. 635; Chambers *v.* Satterlee, 40 Cal. 297; Roll *v.* Augusta, 34 Ga. 326; Rome *v.* Omberg, 28 Ga. 46; Mitchell *v.* Rome, 49 Ga. 19; Quincy *v.* Jones, 76 Ill. 231; Pontiac *v.* Carter, 32 Mich.

164; St. Louis *v.* Gurno, 12 Mo. 414; Taylor *v.* St. Louis, 14 Mo. 20; Mears *v.* Wilmington, 9 Ired. (N. C.), 73; Crossett *v.* Janesville, 28 Wis. 420.

Non-Abutting Property.—According to the Pennsylvania decisions, Const. Art. 16, § 8 entitles a landowner to recover for injuries to his property caused by a change of the street-grade, even though his property does not abut on such street. Taylor *v.* City of Philadelphia, 28 Atl. Rep. 993; Mellor *v.* City of Philadelphia, 160 Pa. St. 614, 34 W. N. C. 182, 28 Atl. Rep. 991.

CITY OF CAMDEN

v.

VARNEY.

(*Court of Errors and Appeals of New Jersey, June 19, 1899.*)

Record of Vital Statistics—Statutes.—"An act to secure in this state the certification of marriages, births and deaths, and of the vital facts relating thereto, and to provide for the record thereof," approved February 15, 1888 (2 Gen. St. p. 2006), supersedes all previous legislation on the subject included in its title.

Municipal Officers—Excessive Fees—Voluntary Payment—Recovery.*—Money paid for a municipal corporation to one of its officers in excess of his lawful fees may be recovered by the corporation in an action against the officer for money had and received to its use, although the payments were made on the order of its governing body, with full knowledge of the facts and without fraud. The defense of voluntary payment is not available in such a case.

(Syllabus by the Court.)

ERROR by defendant to supreme court. *Affirmed.*

Frederick A. Rex, for plaintiff in error.
E. G. C. Bleakly, for defendant in error.

COLLINS, J. The city of Camden, a municipal corporation, sued to recover alleged overpayments of fees by its

*See note at end of case.

treasurer to its clerk. The defense was—First, that the fees were paid upon a lawful exaction; and, second, that their payment was voluntary, through the order of the city council, with full knowledge of the facts, and without fraud on either side. The trial judge directed a verdict in favor of the plaintiff.

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It was decided by the unanimous judgment of this court in Demarest *v.* Inhabitants of New Barbadoes, 40 N. J. Law, 604, that a township committee dealing with a collector of taxes are agents only so far as they act within express provisions of law, and that payments made or sanctioned by them, not authorized by legislative enactment, are *ultra vires*, outside of their agency, and cannot bind their principals, the people. It was further adjudged that unauthorized payments made by the committee to the collector might be recovered as money wrongfully had and received. The doctrine of acquiescence and voluntary payment, insisted on there as here, was held to have no place, because the payments were not by the township, nor with its sanction or approval. This decision controls in the present case, for it is entirely parallel. The right to any fees resting entirely on statute, the knowledge of the clerk of the limit of the council's authority must be presumed. We inquire, therefore, into the legality of the exaction.

Municipal Officers—Excessive Fees—Voluntary Payment—Recovery.

The fees were demanded and paid for services relating to the vital statistics of the city. By "An act concerning marriages, births and deaths" (Revision), approved March 27, 1874 (Revision, p. 631), the clerk of every city in the state was required to keep a record of marriages, births, and deaths, and to send a copy annually to the secretary of state. For these services the city clerk was entitled to receive from the city treasurer 10 cents for the record of each marriage, birth, or death, and 5 cents for each marriage, birth, or death returned to the secretary of state. By "An act concerning the registry and returns of marriages, births and deaths," approved April 5,

Record of Vital Statistics—Statutes.

1878 (P. L. 354), these provisions were expressly repealed, and a different system was instituted. The city clerks were no longer required to keep a record, but by section 10 of the new act were directed to transmit monthly to the secretary of state the actual certificates received by them, and became entitled to receive 5 cents for each marriage, birth, or death returned. Section 12 of the act provided that the secretary of state should send annually to the clerks of the courts of common pleas the returns from the respective counties, which returns the clerks were to arrange alphabetically, and index, for 3 cents for each certificate. In counties where there were boards of health, the clerks of such boards were to perform that service for the same fee. By a supplement approved March 12, 1879 (P. L. 117), section 10 was amended so as to increase to 10 cents the fees for each marriage, birth, or death returned. Section 12 was amended so that the secretary of state, instead of the county clerks, was to arrange and index the returns for each county, and was allowed for the necessary clerical service "the same amount as is now provided to be paid to county clerks for the same service"; and to the amended section was added this clause, *viz.*: "And in case of any county now having a county board of health, or of any city of over thirty thousand inhabitants, the clerk of said county or of the city board shall also keep an indexed registry, and shall receive from the proper authorities of said county or city an amount for each name so registered equal to that heretofore allowed for such index and registry." Camden came within the provision last quoted, which the plaintiff in error claims to be still extant. It is difficult to ascertain the legislative intent in the enactment. I should be inclined to think that the service was supposed to be in substitution for that previously performed by county clerks, and that the fee intended was 3 cents a name; but the construction adopted in Camden seems to have been that the service was that authorized by the repealed act of 1874, and 10 cents a name was exacted and paid. Consequently,

since this supplement of 1879 the city clerk of Camden has received 10 cents a name for his "indexed registry," and 10 cents for each return to the secretary of state. The whole legislation was very crude, and in 1888 was completely recast. On February 15th of that year (P. L. 1888, p. 52) there was approved "An act to secure in this state the certification of marriages, births and deaths, and of the vital facts relating thereto, and to provide for the record thereof." This act embraces the whole subject included in its title, and contains a repealer of all acts or parts of acts inconsistent with its provisions. Section 12 reads as follows: "That it shall be the duty of the assessor and clerk of every township, and of the registrar of vital statistics and the clerk of every city, borough, town or other local municipal government in this state, on or before the fifteenth day of each calendar month, to transmit by mail to the state bureau of vital statistics, at Trenton, in an envelope marked 'Vital Statistics,' all the certificates of marriages, births and deaths received by such officer, and of all 'special returns' of births made during the preceding months; and every such assessor, registrar or clerk, upon receiving a certificate from the medical superintendent of said bureau of the whole number of certificates of marriages, births and deaths returned as aforesaid, shall be entitled to receive from the proper disbursing officer of the township, city, borough, town or other local municipal government, in which such assessor, registrar or clerk shall be an officer, the sum of ten cents for each marriage, birth and death so returned, the receipt for which shall be attached to the said certificate of the said medical superintendent, and no payment shall be made unless such certificate be produced; and it shall further be the duty of the registrar of vital statistics or the clerk of every city containing thirty thousand inhabitants or over, provided he has been or shall be so directed by the common council or other governing body thereof, before transmitting said certificates to the state bureau of vital statistics, to make a complete record of the marriages, births and deaths

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occurring in such city, which record shall be a transcript of the names and vital facts appearing upon the certificates of marriages, births and deaths delivered to him as hereinbefore directed; the said record shall be so made up that the marriages, the births and the deaths shall appear in separate and distinct classes, in books of such form as may be approved by the local board of health, and for making such record the said registrar or clerk shall be entitled to receive from the disbursing officer of said city the sum of three cents for each certificate thus recorded, in addition to his other fees and salary." The section was amended in 1892 (P. L. 351), but not with regard to the duties or fees of city clerks. It is too plain to need argument that this statute superseded that of 1879. Its comprehensive title and clear provisions forbid any other conclusion. Even although the provisions of unrepealed legislation may not be inconsistent with those of a new enactment, still, where it is plain that it is the legislative intent to embrace the whole subject, it is well settled that what is not included in the later statute must be held to have been discarded. Roche *v.* Jersey City, 40 N. J. Law, 257, approved in this court, in Haynes *v.* City of Cape May, 52 N. J. Law, 180, 19 Atl. 176; De Ginther *v.* New Jersey Home, 58 N. J. Law, 354, 33 Atl. 968. Notwithstanding this statute, the city clerk of Camden, besides receiving his lawful fee of 10 cents for each marriage, birth, and death returned to the secretary of state, has also continuously received 10 cents a name for his so-called "indexed registry." This was entirely unwarranted. If the conditions of the act of 1888 were fulfilled (as to which the case is silent), he was entitled to 3 cents per name for the record therein authorized, and that much the trial judge allowed him to retain. The judgment under review recovers only the excess received during the six years preceding the beginning of the action. It must be affirmed.

NOTE.

Public Officers—Excessive Compensation—Recovery.—It has been held that money paid to a public officer in excess of his lawful compensation may be recovered. Weeks *v.* Texarkana, 50 Tex. 81;

Union County *v.* Hyde, 26 Or. 24; Allegheny County *v.* Grier, 179 Pa. 639, 36 Atl. 353; Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577; Jones *v.* Lucas County Comm'rs, 11 Ohio C. C. 136, 1 Ohio C. D. 152.

But the right to recover has been denied. Kershaw County *v.* Camden, 33 S. C. 140; Lasalle County *v.* Milligan, 34 Ill. App. 346; Painter *v.* Polk County, 81 Iowa 242.

BERKA

v.

WOODWARD, CITY TREASURER.

(*Supreme Court of California, June 17, 1899.*)

Municipalities—Validity of Implied Contracts with Officers.*—Under statutes expressly forbidding municipal officers to contract with their municipalities, a municipal officer cannot recover on implied contract with his municipality.

Invalid Contracts—Powers of City Council.—The fact that a claim against a city is allowed by the city council does not give to it a validity which it otherwise would not possess.

APPEAL by defendant from Sonoma county superior court. *Reversed.*

O. O. Webber and *J. R. Leppo*, for appellant.

D. R. Gale and *Campbell & Campbell*, for respondent.

HENSHAW, J. This is an appeal from a judgment in mandate ordering the treasurer of the city of Santa Rosa to honor and to pay two warrants issued in favor of plaintiff by the common council of the city. The warrants were in payment of lumber and materials "had and received by the city from Berka." At the times when the material was supplied, at the times when Berka presented his bills and demands for payment, and at the time when the city council allowed and approved his claims, Berka was an officer of the city and a member of its common

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*See note at end of case.

council. These facts appear by the petition. The defendant interposed a demurrer, both general and special. This demurrer was "overruled without leave to answer," and a peremptory writ of mandate was ordered to be issued.

The question of first importance presented upon this appeal is that of the right of an officer of the city to recover upon an implied contract with the municipality. The following provisions of the law, and of the charter of the city of Santa Rosa, have direct bearing upon this consideration: "No councilman to be directly or indirectly interested in any contract made by them, or in any pay for work done under their direction or supervision." Charter Santa Rosa (St. 1875-76, p. 255). "All bills, claims and demands against the city shall be * * * filed by the city clerk, who shall present it to the council, and they shall allow or reject the same in whole or in part." Charter Santa Rosa (St. 1875-76, p. 257). "Members of the legislature, state, county, city and township officers must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." Pol. Code, § 920. "State, county, township and city officers must not be purchasers at any sale, nor vendors at any purchase made by them in their official capacity." Pol. Code, § 921. "Every contract made in violation of any of the provisions of the two preceding sections may be avoided at the instance of any party except the officer interested therein." Pol. Code, § 922. "Every officer or person prohibited by the laws of this state from making or being interested in contracts, or from becoming a vendor or purchaser at sales, or from purchasing scrip or other evidence of indebtedness, who violates any of the provisions of such laws, is punishable by a fine of not more than one thousand dollars, or by imprisonment in the state prison not more than five years, and is forever disqualified from any officer in this state." Pen. Code, § 71. "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or, (3) other-

Union County *v.* Hyde, 26 Or. 24; Allegheny County *v.* Grier, 179 Pa. 639, 36 Atl. 353; Ellis *v.* Board of State Auditors, 107 Mich. 528, 65 N. W. 577; Jones *v.* Lucas County Comm'rs, 11 Ohio C. C. 136, 1 Ohio C. D. 152.

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which naturally includes within it the contemplation of a profit, but, where possible, the recovery is limited to the actual cost. Fox *v.* Mining Co., 108 Cal. 369, 41 Pac. 308.

Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat*. Spearman *v.* Texarkana, 58 Ark. 348, 24 S. W. 883; Pickett *v.* School Dist., 25 Wis. 551; City of Concordia *v.* Hagaman (Kan. App.) 41 Pac. 133; Gardner *v.* Butler, 30 N. J. Eq. 702; Call Pub. Co. *v.* City of Lincoln, 29 Neb. 149, 45 N. W. 245; Mayor, etc., *v.* Huff, 60 Ga. 221; Currie *v.* School Dist., 35 Minn. 163, 27 N. W. 922; Mayor, etc., *v.* Muzzy, 33 Mich. 61. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, or any rights growing out of a contract, where either the consideration is base, or the contract is against the express prohibition of the law. Thus, in Call Pub. Co. *v.* City of Lincoln, *supra*, the publishing company had sued the city to recover for printing. Bushnell was a stockholder in the plaintiff company, and was chairman of the city council's committee on printing during the time of the publications in question. The court held that the statute of Nebraska prohibiting officers from being interested in any contract with their municipalities, referred to express contracts; that the contract under consideration was an implied contract. It therefore concluded that the contract was not one expressly prohibited by law, and proceeded to discuss and decide the question upon the doctrine of public policy. In City of Concordia *v.* Hagaman, *supra*, the prohibitory statute was "An act to restrain state and county officers from speculating in their offices." The contract there was a contract made by Hagaman when he was a member of the city coun-

cil, for the printing of the ordinances of the city. The court conceded that no recovery could be had if the contract were one expressly prohibited by law, but determined that the legislature had *ex industria* excluded municipal officers, and had limited the operation of the law to state and county officers. That being so, the contract was left to be considered upon the grounds of public policy alone. And in discussing that question the court says: "In considering the question of illegality of the contract, it is proper that a distinction be made between a contract which is illegal because its execution requires the performance of an immoral or unlawful act, or transgresses an express statutory prohibition, and one wherein the act to be performed is lawful, but the agreement is invalid because of the manner it was entered into, or because of incapacity to contract in either of the parties. * * * When the contract looks to the doing of a lawful act, but may be avoided by one of the parties to it because the other party at the time acted in a fiduciary capacity for the first, the rule is applied in order to avoid the possibility of reaping any undue advantage from the contract. When it has been executed without objection, and actual benefits have been received under it, all parties acting in entire good faith, the law is maintained and the ends of justice subserved by disregarding those parts of the express agreement wherein advantage might have been taken, and allowing compensation merely for the reasonable value of the benefits received under it. Considerations of public policy do not require the doing of less than this. The defense of public policy has no element of punishment in it, nor is it allowed out of consideration for the defendant. It is upheld by the consideration which the law ever entertains for the protection of the public, and the settled policy of the courts to give no aid to the enforcement of contracts whose general tendency is injurious to the public. Hence the courts refuse all relief to one who asks compensation for the doing of an act which is conclusively presumed to be hurtful to public interests or morals. When, however, the thing accomplished is proper

and beneficial, and not placed under the ban of any penal prohibitory enactment, the reason for the rule fails, and it should not be applied any further than is necessary for the public good."

This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the supreme court of the United States in President, etc., *v.* Owens, 2 Pet. 527: "No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country. How can they become auxiliary to the consummation of violations of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." And again the same august tribunal, in Coppell *v.* Hall, 7 Wall. 542, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reasons. Where the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation." And in our own state it has been said (Swanger *v.* Mayberry, 59 Cal. 91): "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy." Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. "The test," says JUDGE DUNCAN in Swan *v.* Scott,

11 Serg. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." And this must be so; for, while, as a matter of private justice between individuals, it would be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. Fowler *v.* Scully, 72 Pa. St. 456. *Ex turpi causa non oritur actio.* Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned.

The rule, further, is that, where a statute pronounces a penalty for an act, a contract founded on such act is void, although the statute does not pronounce it void nor expressly prohibit it. Swanger *v.* Mayberry, 59 Cal. 93; Lumber Co. *v.* Hayes, 76 Cal. 390, 18 Pac. 391; Gardner *v.* Tatum 81 Cal. 370, 22 Pac. 880; Merrill *v.* Nightingale, 93 Cal. 458, 28 Pac. 1068; Wyman *v.* Moore, 103 Cal. 214, 37 Pac. 230; Light Co. *v.* Sims, 104 Cal. 332, 37 Pac. 1042; Woods *v.* Armstrong, 25 Am. Rep. 671; Fowler *v.* Scully, 72 Pa. St. 456; Seidenbender *v.* Charles' Admr's, 4 Serg. & R. 151; Brooks *v.* Cooper, 50 N. J. Eq. 761, 26 Atl. 978.

Applying these principles to the contract before us, it is

most manifest that it is not only against the express prohibition of the law, but that the law makes penal upon the part of a public officer the entering into it. We can yield no assent to the contention that our laws apply only to express contracts. The statute itself is general in its terms. Both in the charter provision above quoted, and in section 920 of the Political Code, these officers are forbidden to be interested in "any contract" made by them. The only difference between an express contract and an implied contract is that in the former all of the terms and conditions are expressed between the parties; in the latter some one or more of the terms and conditions are implied by law from the conduct of the parties. Generally, express contracts with a municipality are made under the system of competitive bidding. Usually this is made compulsory by law. To say that implied contracts were not prohibited would be to destroy the purpose and efficiency of the laws, and leave the people at the mercy of careless or unscrupulous officers. The case of Smith *v.* City of Albany, 61 N. Y. 444, is very similar to the one at bar. The council of the city, of which plaintiff was a member, appropriated $2,500 for defraying expenses of a Fourth of July celebration. Upon the day plaintiff furnished horses and vehicles for use in the celebration, and the fair value of their use was the sum of $139. The New York statute made it unlawful for a member of any common council to become a contractor under any contract authorized by the common council, and authorized such contracts to be declared void at the instance of the city. Here was an implied contract, but it was one prohibited by the statute law as well as by considerations of public policy, and the plaintiff was denied any recovery. Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest

will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation. Note the situation here presented. This material was obtained from a member of the city council, and he, as a member of that council, sits in judgment upon the validity and amount of his own claim. If he does not act, still the city is deprived of its right to his services and judgment in determining these very questions.

The fact that the claim was allowed by the council does not give to it a validity which it otherwise did not possess. Pavement Co. *v.* Broderick, 113 Cal. 628, 45 Pac. 863. The duty of treasurer is to pay only legal demands against his funds. The law will not imply a promise to pay for services illegally rendered under a contract expressly prohibited by law. Gardner *v.* Tatum, 81 Cal. 370, 22 Pac. 880. For the foregoing reasons the judgment is reversed, with directions to the trial court to sustain the general demurrer to plaintiff's complaint.

Invalid Contracts —Powers of City Council.

We concur: TEMPLE, J.; MCFARLAND, J.

NOTE.

Officers—Contracts with Municipality—Validity.—See generally 1 Dill. Mun. Corp. (4th Ed.), § 444. That an officer of a municipality cannot recover on a contract entered into with it. See Smith *v.* Albany, 61 N. Y. 444; Bellaire C. Co. *v.* Findley, 5 Ohio C. C. 118; People *v.* Overyssel, 11 Mich. 222; Toronto *v.* Bowes, 4 Grant (Can.) 504; Macon *v.* Huff, 60 Ga. 221; McGregor *v.* Logansport, 79 Ind. 166; Ft. Wayne *v.* Rosenthal, 75 Ind. 156, 39 Am. Rep. 127; Goodrich *v.* Waterville, 88 Me. 39, 33 Atl. 659; Wood *v.* Elliott (C. P.), 26 Pitts. L. J. N. S. 334; Cincinnati, etc., R. Co. *v.* Morris, 10 Ohio C. C. 502, 3 Ohio Dec. 479; Kennett Elec. L. Co. *v.* Kennett Square (C. P.), 4 Pa. Dist. Rep. 707, 8 Kulp 105; People *v.* School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Chute *v.* Barron, 2 Mich. 192; Board,

etc., *v.* Reynolds, 44 Ind. 509, 15 Am. Rep. 205; Milford *v.* Milford Water Co., 124 Pa. 610, 3 L. R. A. 122.

In Concordia *v.* Hagaman (Kan. App.), 41 Pac. Rep. 133, 1 Kan. App. 35, it was held that there could be recovery on a *quantum meruit* on an executed contract entered into in good faith. And in some cases recovery has been allowed where the officer acted in a capacity not conflicting with his official capacity, as a mayor acting as attorney for his city. Niles *v.* Muzzy, 33 Mich. 61, 20 Am. Rep. 670; Police Justice revising city ordinances. McBride *v.* Grand Rapids, 47 Mich. 236.

STATE

v.

BOARDMAN.

(*Supreme Judicial Court of Maine, June 3, 1899.*)

Limiting Use of Street—Validity of Ordinance—Approval.—An ordinance, or town by-law, which sets apart and designates a certain portion of the street or highway over and upon which may be transported on wheels limestone and other materials, where the load, exclusive of a cart or vehicle, exceeds 2,500 pounds in weight, and prohibiting under a penalty all persons from using any other portion of the street for such purposes, is not required to be approved by the county commissioners or a justice of this court in order to become valid.

Same—Same.*—Such a by-law is not inconsistent with any law of the state. It does not deprive a person of any right; it simply regulates the exercise of it, and affords all travelers much better opportunities for travel than they would otherwise enjoy.

Same—Same.—Whether such a by-law is reasonable and valid with reference to the way and locality in this case, *held*, that the portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose, and the by-law will be valid or invalid, depending upon whether that portion of the way to which such vehicles are restricted is or is not reasonably suitable for the purpose.

Same—Reasonableness of Ordinance—Evidence.—Where the defendant charged with violating such a by-law offered evidence to

*See generally, 24 Am. & Eng. Enc. of Law 39 *et. seq.*

prove that the portion of the street to which his heavily loaded team was restricted was absolutely impassable, *held*, that the evidence should have been admitted, because, if true, the by-law became unreasonable.

Same—Same—Question for Court.—The question of the reasonableness of a by-law is for the determination of the court. Certain facts are to be passed upon by the jury, but the standard upon the question of the reasonableness or otherwise of the by-law is established by the court.

(Official.)

EXCEPTIONS by defendant from Knox county supreme judicial court. *Exceptions sustained.*

Defendant offered evidence to show "that the portion of the street covered by the by-law, under which this complaint was made, was, at the time the offense was alleged to have been committed, and for years prior thereto had been, constantly used by the teamsters in hauling lime rock from the quarries near the Camden line to the kilns at Rockport, a distance of some half mile; that the constant hauling of such heavy loads of rock, averaging three or four tons per load, exclusive of weight of the team, over and upon said 15-foot space of reserved or specified part of the road, had cut deep ruts in that part of the road, and thrown up great ridges of earth, making it very difficult or well-nigh impossible to keep that portion of the road in suitable repair for the passage of ordinary teams at all times; that the defendant, carrying on the business of freighter or teamster, hauling freight between Camden and Rockland, used the kind of cart or team in common use for carriage of miscellaneous freight, to wit, a jigger or slung body, having the body of the cart less than eight inches from the ground when light, the body hung low for convenience in loading and unloading heavy freight; that owing to the rutted and ridged condition of this said 15-foot space he found it impossible during the greater part of the time to drive over it with his loaded jigger, the weight of a heavy load causing the body of the jigger to 'squat' or settle some two inches or

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more; that upon the day named in the complaint he drove over said Union street with his jigger loaded with a 7,000-pound anchor, the body of the jigger by reason of this weight being pressed down to within six inches of the level ground; that when he came up to the quarry road, where the quarry road comes up into the main road, as was his custom, he drove into that 15-foot limit; that he drove there a short distance before he found that the body was very likely to drag in a very short time; that the ruts were there ahead of him as far as he could see; he knew the minute the body dragged that he was stalled, and could not get out; that he could not yank it out by putting on horses; that it would break the jigger, and rather than that he got out of the ruts when he could."

Defendant also offered evidence tending to show that the rutted and ridged condition of the said 15-foot strip of road was continuous during all that portion of the year when lime rock was hauled over that portion of the road on wheels, making it impossible for him to comply with the terms of the by-law, unless his business as freighter was entirely given up. But this evidence was excluded on the ground that it was immaterial, as it was not claimed that the condition of the highway within 15 feet of the westerly rail of the electric road was due to any sudden or unforeseen emergency.

Argued before EMERY, HASKELL, WHITEHOUSE, WISWELL, STROUT, and FOGLER, JJ.

Washington R. Prescott, Co. Atty., for the State.

M. T. Crawford, for defendant.

WISWELL, J. Complaint for the alleged violation of the following ordinance or by-law of the town of Rockport: "All of that portion of Union street in Rockport situated northerly and westerly and within fifteen (15) feet of the northerly and westerly rail of the Electric R. R. track, is hereby set apart and designated as the portion of said street

over and upon which limestone may be transported on wheels, also all other material on wheels, where the load, exclusive of cart, wagon or vehicle, exceeds 2,500 pounds in weight; and all persons are prohibited from using any other portion of said street for the purposes aforesaid; and any person engaged in transporting limestone on wheels or other material of the weight aforesaid, on wheels, using any other portion of said street for such purpose, shall be fined not less than two nor more than five dollars for each offense, to be recovered, by complaint, to the use of the town of Rockport."

The respondent attacks the validity of this by-law upon three grounds, namely: Because it had never been approved by the county commissioners of Knox county or by a justice of the supreme judicial court; because it is inconsistent with the laws of the state; and because it is unreasonable. Must such an ordinance be approved by the county commissioners or by a justice of this court? We think not.

Limiting Use of Street—Validity of Ordinance—Approval.

The legislature of this state has, by various enactments at different times, given to municipalities the power to adopt by-laws in regard to a large number of matters, all of which different enactments have been condensed into section 59, c. 3, of the present Revised Statutes. As that section now reads, municipalities are authorized to adopt such ordinances for the purposes named in 12 separate paragraphs. By paragraph 1, "for managing their prudential affairs," such by-laws must be approved by the county commissioners or by a judge of this court; but, in regard to by-laws in relation to the purposes enumerated in the other 11 paragraphs of the section, no such approval is made necessary.

Same—Same.

The words "prudential affairs" are certainly very indefinite and unsatisfactory, and it might be a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression. This term was taken from the Massachusetts statute, where the same

difficulty has been appreciated. In the case of Spaulding *v.* Lowell, 23 Pick. 71, CHIEF JUSTICE SHAW said: "The ambiguity lies in the indefinite term, 'prudential affairs,' and the difficulty arises in each case in settling what concerns fall within it." But, however indefinite the term may be, that it was not intended to cover the matters enumerated in the other paragraphs of the section is shown, we think, both by the language of the original enactments and the text and arrangement of paragraphs in the section of the Revision, by which towns are empowered to make by-laws in regard to police regulations, respecting infectious diseases, for setting off portions of streets for sidewalks, in regard to the erection of wooden buildings, and as to various other matters.

The authority of a municipality to adopt such an ordinance as the one here under consideration is given, we think, by paragraph 9: "For the regulation of all vehicles used therein, by establishing the rates of fare, routes and places of standing, and in any other respect."

So, therefore, it only remains to inquire whether this by-law is inconsistent with law or is unreasonable. We are unaware of any law of the state which it contravenes. All public ways and streets are for the accommodation primarily of travelers of all classes and kinds, but the traveler is not in all or in many cases entitled to the whole width of the street for his accommodation. He is entitled to a reasonably safe, convenient, and practicable opportunity for travel and passage. A portion of a way as located, not being needed for travel, may be left outside of the wrought road, another portion may be set off for sidewalks, and the use of the remaining width of the way so regulated that heavily loaded teams and other vehicles shall use exclusively different portions thereof, and still no one would be deprived of his rights, but, upon the other hand, all might be very much benefited in the exercise of them.

Highways and streets are, of course, for the public use. They are not alone for the people of the municipality in which they are located, and such ways cannot be considered

in any sense the easement or property of the town; but the municipality in which a public way is located has been vested by the legislature with the supervision and control of such ways for public use, and is charged with the responsibility of keeping them in repair and reasonably suitable and sufficient for use by the public for purposes of travel. The power to properly regulate the use of ways so as to preserve for all the rights of all is not inconsistent with any provision of law.

Such a by-law does not deprive a person of any right; it simply regulates the exercise of it, and it can be readily seen that such a regulation may afford to all travelers much better opportunities for travel than they could otherwise enjoy.

In Com. *v.* Stodder, 2 Cush. 562, the court said: "We cannot doubt that a by-law, reasonably regulating the use of the public streets of the city as to carriages of an unusually large size, or as to those which from the mode of using them would greatly incommode, if not endanger, those having occasion to use such public streets, would be valid and legal, and that such regulations might prescribe certain streets as the route of travel for such vehicles, and provide for their exclusion from certain other streets."

Was this by-law reasonable? By its terms all persons passing over the street named, with any vehicle on which there were loads exceeding 2,500 pounds in weight, are restricted to the use of 15 feet of the width of the street next to the electric railroad track. That this would be a reasonable, and in many cases a most salutary, regulation, we have no doubt. But such a by-law might be unreasonable, if that portion of the way to which such vehicles were restricted was allowed to become in such a condition as to be impassable; that is, if the only portion of the way which the by-law allowed to be used for heavily loaded vehicles could not be at all used, because it had been allowed to become in such a condition of want of repair as to be impassable, then that portion of the public who had occasion to use the way for this

purpose would be absolutely deprived of their right to use the way for the purpose of travel.

For such a by-law, then, to be reasonable and valid, with reference to such a way and in such a locality as in this case, that portion of the street which may be used by heavily loaded vehicles must be reasonably suitable for the purpose, and the by-law will be valid or invalid, depending upon whether that portion of the way to which such vehicles are restricted is or is not reasonably suitable for the purpose.

Same—Same.

Here the defendant offered evidence tending to prove that the 15 feet in width of street next to the railroad track was absolutely impassable. The evidence was excluded. We think it should have been admitted, because, if true, the by-law became unreasonable.

Same—Reasonableness of Ordinance—Evidence.

It is true that the question of the reasonableness of a by-law is for the determination of the court, and this conclusion does not take away from the court the determination of the question. Certain facts will have to be passed upon by the jury, but the standard upon the question of the reasonableness or otherwise of the by-law is established by the court.

Same—Same—Question for Court.

Exceptions sustained

BOARD OF EDUCATION OF RIDGEFIELD TP.

v.

BOARD OF EDUCATION OF BOROUGH OF CLIFFSIDE PARK.

(*Supreme Court of New Jersey, June 12, 1899.*)

Action on Municipal Bonds—Authority to Issue — Pleading.*— In an action upon an obligation of a municipal corporation, issued by special agents, facts must be averred which show the authority of such agents; but, when the obligation is issued by the corporation or its general agents, no such averments are essential.

[redacted] note at end of case.

Board, etc., of Ridgefield Tp. *v.* Board, etc., of Cliffside Park

Statute—Titles.—The provisions of the supplement to the public instruction act, approved April 6, 1897 (P. L. 1897, p. 154), which were considered in McCully *v.* Board (N. J. Sup.) 42 Atl. 776, and a cognate supplement, approved April 22, 1897 (P. L. 1897, p. 242), are within the object expressed in the titles of the acts.

(Syllabus by the Court.)

THE count of the declaration demurred to avers that the trustees of school district No. 1 in the county of Bergen, a corporation of this state, for the purpose of building a school house in said district, and raising the money necessary therefor, pursuant to the "Act to establish a system of public instruction," approved March 27, 1874, and the supplements thereto, made a certain bond payable to bearer, which was delivered to Francis K. McCully who became thereby the owner of said bond, and entitled to the principal and interest thereon. It further avers that on July 4, 1894, by virtue of the provisions of an amendment to the public instruction act, the said school district No. 1 of the county of Bergen and the corporation known as the "Trustees of School District No. 1 in the county of Bergen" were consolidated with the other school districts in the township of Ridgefield under the name and designation of the plaintiffs in this action, and that by virtue of said act of the legislature the bond of which McCully was the bearer became the obligation and indebtedness of the plaintiffs, who were legally bound to pay the same. It further avers that, after the said bond became the obligation and indebtedness of these plaintiffs, the borough of Cliffside Park was formed out of the township of Ridgefield, and became a separate and distinct school district and corporation by the name of "The Board of Education of the Borough of Cliffside Park in the County of Bergen," and that within the territorial limits of the said borough of Cliffside Park was and is the school house and property formerly belonging to the plaintiffs in this action, by reason of the consolidation of school district No. 1 in the county of Bergen with these plaintiffs, and for the erection of which the said bond was

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issued, and that thereby the said defendants became entitled to said school house and property. It further avers that on September 5, 1896, an action was commenced in this court by said McCully against the plaintiffs to recover the amount of his said bond, and that such proceedings were had therein that on February 16, 1897, McCully recovered a judgment against the plaintiffs for $1,227.59. It further avers that the plaintiffs, upon a writ of execution issued against them upon such judgment, paid, in satisfaction thereof, the sum of $1,342.55, and that by means thereof, and according to the tenor and effect of an act entitled "A supplement to an act entitled 'An act to establish a system of public instruction [Revision],' passed March 27, 1874," approved April 6, 1897, and a further supplement to the same act, approved April 22, 1897, the defendants became liable to reimburse and pay to the plaintiffs the sum of money paid by the latter upon the said judgment, with interest.

Argued February term, 1899, before MAGIE, C. J., and GARRISON, LIPPINCOTT, and COLLINS, JJ.

Charles J. Roe, for plaintiff.

Samuel G. H. Wright, for defendant.

MAGIE, C. J. (after stating the facts). The first cause of demurrer presented by defendant is that the count demurred to fails to show that the trustees of school district No. 1 in the county of Bergen, the maker of the bond in question, had power to make the same. The averment is that the bond was issued pursuant to the public instruction act of March 27, 1874. The second cause of demurrer assigned by defendant insists that this statement is insufficient, because by that act authority to issue such bonds by school districts requires the consent of the inhabitants of the district. When corporate bonds of a municipality are issued by special agents having limited powers, the declaration on such bonds must exhibit the possession of such powers. Morrison *v.* Inhabitants of Bernards Tp., 36 N. J. Law, 219;

Action on Municipal Bonds—Authority to Issue—Pleading.

Cotton *v.* New Providence, 47 N. J. Law, 401, 2 Atl. 253. But when corporate bonds are issued by general agents, or the corporation itself, no such averments are necessary. Montague *v.* School Dist., 34 N. J. Law, 218; Rahway Sav. Inst. *v.* City of Rahway, 53 N. J. Law, 48, 20 Atl. 756. The averment of this count that the bond in question was issued by the corporation known as the "Trustees of School District No. 1 in the County of Bergen" is sufficient. The third cause of demurrer assigned by defendant is that the acts of the legislature of April 6, 1897, and of April 22, 1897, upon which the liability of the defendant to the plaintiff is founded, are void, because the objects of said acts are not expressed in their titles. The provisions of the act of April 6, 1897, were construed by this court in the case of McCully *v.* Board (N. J. Sup.) 42 Atl. 776. It was there held that the act imposed the indebtedness of a bond such as that in question upon a separate school district set off from a township, if there was within its limits a school house belonging to the board of education of the township, and for the erection of which there is an indebtedness on such bond for which the said board is liable, and that the said indebtedness shall be assumed and become the obligation of the board of education of the set off school district, and that whenever the board of education of the township is compelled to pay by suit and judgment at law any portion of such indebtedness the board of education of the set off school district must repay to the board of education of the township the amount of the judgment, with interest, and the same may be collected by action. The objection now made to this legislation does not seem to have been presented to the mind of the court in that case. The provisions of the act of April 22, 1897, substantially impose the same obligation. The act to establish a system of public instruction, approved March 27, 1874, conferred corporate powers for school purposes, including the power to purchase land to build school houses, to borrow money for those purposes, and to incur and issue obligations therefor. These corpo-

Statutes—Titles.

rate powers are plainly within the title of the act under the construction given to our constitutional provision on that subject in cases too well known to require citation. Legislation properly apportioning or imposing obligations that have been thus issued among such corporations as the legislature deemed to be properly liable are within the scope of the title of the public instruction act in question. The result is that the demurrer must be overruled, and the plaintiff is entitled to judgment thereon.

NOTE.

Municipal Bonds—Actions—Pleadings.—The declaration in an action on a municipal bond must exhibit the authority or power to issue it. Nashville *v.* Ray, 19 Wall. 468; Thayer *v.* Montgomery Co., 3 Dill. C. C. R. 389; Kennard *v.* Cass Co., 3 Dill. C. C. R. 147.

EVANS *et al.*

v.

CITY OF DENVER *et al.*

(*Supreme Court of Colorado, April 17, 1899.*)

Local Assessments—Retrospective Laws.—A statute providing that when any assessments for the construction of sewers theretofore made by a city have been declared invalid by an appellate court of the state, the city may, nevertheless, upon the passage of a resolution by the council declaring such sewers necessary for sanitary purposes, assess the value of that portion of a sewer adjoining lots, assessments for which remain unpaid, against such lots, with interest from date of construction, is in conflict with a constitutional provision prohibiting the passage of retrospective laws.

Retrospective Laws—Constitutional Provisions.—That such assessment as was attempted to be made in the leading case is void under a constitutional provision forbidding the passage of a law retrospective in its operation, see City of St. Louis *v.* Clemens, 52 Mo. 133. Such general prohibition is found in the constitutions of Colorado, Georgia, Maryland, Missouri, Montana, and Ohio.

Evans *v.* City of Denver

ERROR by plaintiffs to Arapahoe county district court. *Reversed.*

In the case of Keese *v.* City of Denver, 10 Colo. 112, 15 Pac. 825, it was held by this court that the assessments levied to defray the expense incurred in constructing a sewer in the Thirteenth sewer district of the city of Denver, under the provisions of ordinances passed by its council March 6, 1882, and July 3, 1883, which created this district, and under which such assessments were made, could not be enforced, because the provisions of the city charter relative to conditions precedent had not been observed, which were necessary in order to legally authorize the assessment of adjoining lots with their *pro rata* share of the expense of the construction of such sewer. In 1893 the general assembly passed an act which, in terms, provided that when, by final judgment of the court of appeals or of this court, any assessments heretofore made by the city of Denver for the construction of sewers in any district in the city have been declared invalid in a direct action to determine their validity, the city nevertheless may, upon the passage of a resolution by the council declaring such sewers necessary for sanitary reasons, assess the reasonable value of that portion of the sewer adjoining lots in the district, assessments for which remain unpaid, against such lots, with interest from date of construction. Section 48, art. 7, p. 219, Laws 1893. Under this law the city council caused the respective lots of the respective plaintiffs to be assessed for the purpose of defraying the expenses of the construction of the sewer, the former assessments for which, in Keese *v.* City of Denver, had been declared invalid; and it is to restrain the collection of these latter assessments that plaintiffs brought this action. Upon the issues being made up, the parties entered into a stipulation regarding the facts, by which the only question presented for determination is whether or not section 48, *supra*, is in conflict with section 11, art. 2, of the constitution, which provides in express terms that no law retrospective in its operation shall be passed by the general assembly. The

judgment of the trial court was in favor of the defendants. Plaintiffs bring the case here on error.

Benedict & Phelps, *Robert W. Bonynge*, and *Horace Phelps*, for plaintiffs in error.

J. M. Ellis, *S. L. Carpenter*, *F. A. Williams*, *G. Q. Richmond*, and *John C. Norris*, for defendants in error.

GABBERT, J. (after stating the facts). The only question presented, and upon which a decision of the case rests, is whether or not the act of the legislature under which the city, by its subsequent action, seeks to enforce the collection of the levy made, is retrospective in its legal sense. It will be observed that this levy is for the purpose of compelling adjacent lot owners to pay the expenses of a sewer constructed prior to the time when the act of the general assembly authorizing the action of the municipal authorities, which plaintiffs in error seek to restrain, took effect. By the terms of the city charter in force when the sewer was constructed it was provided: "The city council shall cause sewers to be constructed in any district whenever a majority of the property holders resident therein shall petition therefor, or whenever the board of health recommend the same as necessary for sanitary reasons, and said recommendation is approved by the city council." Laws 1879, p. 200, § 3. Neither of these conditions was observed, but it is contended by counsel for the city that it is within the power of the legislature to pass an act curative in its nature, whereby illegal assessments for public improvements may be legalized. In the Keese Case, *supra*, the assessments were declared invalid, not because of any irregularity in making the levy, but for the reason that no obligation to pay for the sewer existed, because the preliminary steps authorizing its construction had not been observed. This omission constituted a conclusive defense against any action on the part of the corporate authorities in attempting to enforce a liability against lot owners for the cost of the construction of such sewer. Before this act, no steps could be

taken by the city which would create any liability against them on this account, but now, by its terms, it authorizes the municipal authorities, by the adoption of a resolution nearly 10 years subsequent, to reach back, change, and modify the effect of a past transaction, and give it a different legal result from that which it had under the law when it took place, by attempting to make legal that which before was void, which renders nugatory the complete defense of plaintiffs and others similarly situated, which, before, they could assert against any action to compel them to pay for this sewer, and authorizes the imposition of a liability with respect to a past transaction, which, before, had no existence. This brings the case clearly within the definition of what constitutes a retrospective statute in its legal sense, which, according to text writers and many well-considered cases on the subject, embraces a statute which abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past. Railway Co. *v.* Woodward, 4 Colo. 162; Woart *v.* Winnick, 3 N. H. 473; Clark *v.* Clark, 10 N. H. 380; Society *v.* Wheeler, 2 Gall. 105, Fed. Cas. No. 13,156; Insurance Co. *v.* Flynn, 38 Mo. 483; City of St. Louis *v.* Clemens, 52 Mo. 133; Sedg. St. & Const. Law (2d Ed.) 160; French *v.* Deane, 19 Colo. 504, 36 Pac. 609. In the absence of constitutional restrictions, it has been held that it is competent for the legislature to enact retrospective statutes to validate an irregular or defective execution of a power by a municipal corporation; but, where the constitution of a state contains a special provision against such legislation, such acts, when their legal effect is retrospective, cannot be upheld. Dill. Mun. Corp. (6th Ed.) §§ 544, 814; Cooley, Const. Lim. (6th Ed.) p. 455. Such laws have always been regarded with distrust, for frequently thereby liabilities were imposed which were oppressive and unjust, the effect of which could not be avoided upon the ground that they were *ex post facto*, or impaired the obligation of contracts, and it was to prevent such legislation that several of the states (including Colorado) have an express con-

stitutional inhibition against legislation of this character. On the admitted facts, the act under which the city authorities claim to derive their power in this instance, in so far as it affects transactions antedating the time when it took effect, contravenes the fundamental law of the state respecting retrospective legislation, and therefore renders the attempt of the municipality to enforce any liability as to these transactions ineffectual. The judgment of the district court is reversed, and the cause remanded, with directions to render judgment in favor of plaintiffs in error, enjoining the defendants from collecting the assessments mentioned in the complaint. Reversed and remanded.

TOWN OF PARSONS

v.

MILLER *et al.*

(*Supreme Court of Appeals of West Virginia, April 8, 1899.*)

Evidence—Corporate Books.*—The corporation books concerning the government of a city, town, or village, when they have been publicly kept, and the entries have been made by a proper officer, as well as duly-authenticated copies therefrom, are admissible evidence of the facts witnessed in them.

Official Bonds—Liability of Sureties.—Sureties on an official bond are liable for money in the hands of their principal at the date of the bond, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the principal obligor in the course of a precedent term of office or employment. If they make the defense that the money was collected or otherwise came into the hands of the principal before the execution of the bond, it is incumbent upon them to show also that it was misapplied before that time.

(Syllabus by the Court.)

ERROR to Tucker county circuit court. *Reversed.*

*See note at end of case.

Town of Parsons *v.* Miller

W. B. Maxwell and *A. J. Valentine*, for plaintiff in error.
L. Hansford, for defendants in error.

McWHORTER, J. The town of Parsons brought its action before M. F. Lipscomb, a justice of Tucker county, against M. V. Miller, late sergeant of the town, and S. A. Moore and L. M. Austin, sureties on his official bond, and filed an account, as bill of particulars, against the defendants, by name, as indebted to the town of Parsons, "on account of money had and received by said M. V. Miller, late town sergeant (on official bond), $300.00," and filed the following notice: "Parsons, W. Va., Nov. 10, '96. At a meeting of the town council of Parsons held November 9th, 1896, the following motion was made and carried: 'On motion, it is ordered that M. V. Miller, late sergeant of this town, do pay over to L. H. Layten, the present sergeant, all money due the town from him as late town sergeant, and that L. H. Layten, town sergeant, is directed to present a copy of above order to the said M. V. Miller, and demand immediate payment. F. M. Kelly, Recorder. Wm. G. Conley, Mayor.' Executed the within notice by delivering to the within-named M. V. Miller a true copy hereof this the tenth day of November, 1896. L. H. Layten, Town Sergeant." The defendants made no answer, either oral or in writing. The justice heard the case, and rendered judgment for plaintiff for $86.58, with interest and costs. Plaintiff appealed from this judgment to the circuit court. On the 12th of March, 1898, a jury was impaneled to try the case; the plaintiff introduced its evidence, to which evidence the defendants demurred, and in which plaintiff joined; the defendants offered no evidence; and under the direction of the court the jury returned the following verdict: "If the law be for the plaintiff, then we, the jury, find for the plaintiff, and assess its damages at $249.50; but, if the law be for the defendants, then we find for the defendants." The court took time to consider of the demurrer, and on the 21st day of June, 1898, entered an order sustaining the demurrer, and giving judgment for defendants for costs. In the course of the

trial, plaintiff took three several bills of exception, which were duly signed and made a part of the record. The plaintiff sued out a writ of error, and assigns as error the refusal of the court to permit plaintiff to give in evidence the settlement referred to in, and made part of, the first bill of exceptions, which says "that upon the trial of this case a settlement made with M. V. Miller as town sergeant, dated on the 31st day of August, 1895, in the words and figures following, to wit, was offered to be introduced in the evidence of C. W. Minear: 'The finance committee submitted the following report, ending Aug. 1st, 1895: M. V. Miller, Sergeant, Dr.,' "—then proceeds to give a number of items under the "Dr." column and a number under the "Cr." column, and striking a balance, and signed "J. R. Seiler, M. H. Godwin, R. F. Rightmire, Committee." To the introduction of which defendants objected, and the objection was sustained, and exception taken. There is nothing to connect this report in any manner with the records of the town council. It does not purport to be a part of the record of plaintiff, or a copy from its minutes; and, while the bill of exception says it "was offered to be introduced in the evidence of C. W. Minear," the only evidence found in the record of any "Minear" is the following, without caption or closing, interjected into a deposition of witness Howard Shaffer: "Mr. Minear: Q. What office do you hold? A. Recorder of the town of Parsons. Q. What is this book? A. Record Book." With nothing more to show its connection with the case, it was properly rejected as evidence.

The second assignment is for error in refusing to permit plaintiff to give in evidence the settlement referred to in, and made a part of, bill of exception No. 2, introduced and offered as evidence with the evidence of R. F. Rightmire. The evidence offered was a settlement made with M. V. Miller, town sergeant from the 1st day of February to September 21, 1895. This report or settlement is made out precisely in the same form as the former, and signed by a committee of the council, and in addition is shown to have

been by the town council made a matter of record, and is identified and proven by the record of the town council, by witness Howard Shaffer, and by witness Rightmire, who was a member of the council committee who made the settlement. "The corporation books concerning the government of a city or town, when they have been publicly kept, and the entries have been made by a proper officer, are admissible evidence of the facts witnessed in them." Starkie, Ev. 308; Grafton *v.* Reed, 34 W. Va. 172, 12 S. E. 767 (Syl., point 2). This settlement should have been admitted. It showed a balance due from Miller to the town at that date (September 21, 1895) of $663.92. Of the items of debit in this settlement on account, among others, was one item of $827.39, tax receipts for 1895.

Evidence—Corporate Books.

The third assignment is the refusal of the court to allow witness Rightmire to answer the following question touching the balance found due the town, on settlement, of $663.92: "At that time what was it Mr. Miller brought in to represent the $663?" As the answer could only concern, and probably prove, offsets of the defendant Miller, the ruling could not be prejudicial to plaintiff, and is no cause of complaint on its part.

Plaintiff introduced in evidence the official bond of M. V. Miller, with S. A. Miller and L. M. Austin as his sureties, in the penalty of $1,500, dated September 23, 1895, filed and approved September 23, 1895, and the notice, with the evidence of service thereof upon said M. V. Miller, requiring him to pay over to his successor all money due from him, as late sergeant, to the town, under which order it was his duty to pay it over to his successor, unless he had legal grounds for refusing to so pay it. Board *v.* Parsons, 22 W. Va. 308 (Syl., point 2). Plaintiff introduced as a witness Howard Shaffer, recorder of said town in 1897, who testified from the record that M. V. Miller resigned his office of sergeant September 18th, and on the 21st the settlement was

made which showed Miller due the town $663.92, which balance was carried to his final settlement to the council January 30, 1896; that the balance at that time was $392.90; that that amount was carried into another settlement of the council for 1896, had July 10, 1896, in which last settlement Miller was erroneously charged with $68.28 taxes. "Q. What is that error? A. Taxes in settlement of September, '95. He was charged with them, and that balance was credited afterwards in this settlement. Mr. Miller owed a balance of $317.35, and by taking balance of $68.25 would leave still owing the town $249.50. Q. State whether you were recorder of the town at the time this suit was instituted. A. I was. Q. Was that amount the amount the town brought suit against him for? A. I think the suit was brought for $300, but we only claimed $249.50." This evidence of witness Shaffer is without objection on the part of defendants, as is also the introduction of the record book of the town, upon which he testifies, and the bond, and the notice to pay the money. There is nothing in the record to show what the contention of defendants is,—whether they claim simply that the principal defendant is not indebted to the town, or whether they would throw the liability on the sureties in a former bond, except that by implication the inference may be gathered from the cross-examination of witness Shaffer, where they prove the fact that a former bond was given.

Official Bonds—Liability of Sureties.

"Sureties on an official bond are liable for moneys in the hands of their principal at the date of the bond, provided such money forms a part of the fund which the bond was intended to secure, and came to the hands of the principal obligor in the course of a precedent term of office or employment. If they make the defense that the money was collected, or otherwise came into the hands of their principal, before the execution of the bond, it is incumbent upon them to show also that it was misapplied before that time." Murfree, Off. Bonds, § 636; Hetten *v.* Lane, 43 Tex. 279. While this evidence was admitted without objection, and is amply sufficient to support

the verdict of a jury, the defendants' demurrer admits it to be true. Lee's Ex'rs *v.* Bridge Co., 18 W. Va. 299. In Heard *v.* Railroad Co., 26 W. Va. 455, it is held that, "if the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant." For the reasons herein given the judgment of the circuit court is reversed, and judgment entered in this court upon the verdict of the jury for $249.50 in favor of the plaintiff.

NOTE.

Records as Evidence for Municipality.—The record of the official proceedings of a municipal corporation, which it is required to keep by law, when properly authenticated, is admissible as evidence for the municipality. See 15 Am. & Eng. Enc. of Law 1076 *et seq.*

PORTSMOUTH GAS CO.

v.

SANFORD *et al.*

(*Supreme Court of Appeals of Virginia, June 15, 1899.*)

Municipal Corporations as Garnishees.*—A municipal corporation in an action against non-resident contractors to which it is indebted for the construction of a complete work, may be garnisheed under the statute of Virginia authorizing garnishment proceedings against "persons" indebted to non-resident defendants.

ERROR by plaintiff to city of Portsmouth circuit court. *Reversed.*

Crocker & Crocker and *R. C. Marshall*, for plaintiff in error.

Watts & Hatton, for defendants in error.

BUCHANAN, J. The plaintiff in error brought an action on the case against the defendants in error to recover dam-

*See notes at end of case.

ages for injuries alleged to have been done to the mains and sewer pipes of the plaintiff. The defendants, who were contractors with the city of Portsmouth to construct a system of sewerage, were nonresidents of the state, and, the city being indebted to them on that account, an attachment was sued out and levied by serving a copy thereof on the city, which was designated as owing and having estate of the defendants in its possession.

When the case, which had been regularly matured by order of publication, was called, the defendants appeared specially, and moved the court to quash the attachment, on the ground that the city of Portsmouth was not liable to garnishment. The court sustained the motion, quashed the attachment, and dismissed the action. To that judgment this writ of error was awarded.

The only question involved is the right of the plaintiff to subject the debt due from the city of Portsmouth to the defendants under the provisions of our attachment law, which authorizes garnishment proceedings against persons indebted to nonresident defendants.

Section 2967 of the Code provides, among other things, how the estate of a nonresident defendant may be levied upon under attachment proceedings, and how any person indebted to or having in his hands effects of such defendant may be summoned as a garnishee.

The words "any person," used in that section, include corporations, as well as natural persons. In Railroad Co. *v.* Gallahue's Adm'rs, 12 Grat. 655, 663, it was held that when the word "person" is used in a statute, corporations, as well as natural persons, are included for civil purposes. This was the rule at common law. 2 Inst. 697, 703. They are to be deemed and taken as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in such statutes.

Section 5, subsec. 13, of the Code provides that the word "person" may extend and be applied to bodies politic and corporate, as well as individuals.

JUDGE ALLEN, in delivering the opinion of the court in Railroad Co. *v.* Gallahue's Adm'rs, *supra* (at pages 663, 664), said: "The general words, as to what effects, debts, or estate may be attached, would seem to embrace his whole estate, without respect to the character of the person, natural or artificial, in whose hands the effects were, or by whom the debt was due. The corporation stands in precisely the same position, in regard to such effects or debts, as a natural person. If it owes the debts or holds the effects of another, it, like an individual, is liable to be sued by its creditor or the owner of the property; and the statute merely substitutes the plaintiff in the attachment to the rights of the creditor or owner, as against the garnishee. No change is made in its contract, or additional obligation imposed on it, by being proceeded against as a garnishee."

The reasoning of JUDGE ALLEN is applicable to all corporations, and all, it would seem, should be held to be within the statute, unless there be some rule of public policy which would exclude municipal corporations.

It is well settled that the officers of the state are not liable to such proceedings without its consent (Rollo *v.* Insurance Co., 23 Grat. 509; 2 Wade, Attachm. § 346; Drake, Attachm. [7th Ed.] § 516); and it is claimed that, upon similar grounds, municipal corporations should not be. In the courts of many of the states this view prevails, and the reason upon which it is based is thus stated by a learned writer upon the subject:

"The foundation of the doctrine that municipal corporations cannot be called upon to answer as garnishees is purely a question of public policy. They are regarded as integral branches of the government, exercising only public functions, and intended to guard public interests. To permit them to be subjected to actions, and possible judgments and expense, in relation to matters in which they have no interest, it is deemed, would be an intolerable burden, in view of the large number of persons who necessarily stand towards them as creditors. To turn them into mere instruments for

the collection of private debts, it is thought, would detract from their dignity and be subversive of the public interest. To place the debts owing by large cities, towns, or other municipal corporations within the reach of this facile process, it is feared, might endanger the working capacity of the government, by driving away the employees upon whom its executive duties devolve, thus endangering the peace and good order of the community; and much more to the same general purport, which is not, however, universally convincing." 2 Wade, Attachm. § 345.

Mr. Dillon, in his work on Municipal Corporations, while conceding that the weight of authority is in favor of the nonliability of municipal corporations to garnishment, expresses the opinion that, where the question is left entirely open by statute, on principle a municipal corporation is exempt from liability of this character, with respect to its revenues and the salaries of its officers, but that, where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives creditors of natural persons and private corporations. 1 Dill. Mun. Corp. (4th Ed.) § 101.

By an act approved February 19, 1898 (Acts. Assem. 1897–98, c. 410, p. 445), express authority is given to subject the wages and salaries of the officials, clerks, and employees of a municipal corporation by garnishment, where a judgment has been rendered against any such official, clerk, or employee. If it be the policy of the state, as shown from this act, to make a municipal corporation liable to garnishment upon debts due its officials, there would seem to be no good reason for holding that it should not be liable to proceeding where it owes an ordinary debt to a third person, unless a contrary rule has been established in this state. We have no decision of this court upon the precise point. In the case of Hicks *v.* Brick Co., 94 Va. 741, 27 S. E. 596, it was held that a writ of *fieri facias* against a contractor was a lien upon the amount due him by the city of Roanoke for

work done. In order to subject that fund in the hands of the city, and make the lien available, the execution creditor would have the right, it would seem, from the very necessity of the case, to implead the city, and bring it before the court. If the city can be brought before the court, in order to subject the fund in its hands to the satisfaction of the lien, there is no reason why it cannot be done by garnishment; for in that proceeding its rights can be as fully protected as in any other. Besides, the objection to holding municipal corporations liable to garnishment is not based upon the form of the proceeding, but upon the ground that such corporations should not be impleaded at all in controversies in which they have no interest, and where the object of bringing them before the court is merely to subject funds in their hands, due to one of the litigating parties, to the payment of a debt due the other.

If a municipal corporation is liable to garnishment in the ordinary case, where both the execution debtor and the garnishee are residents of the state, it is clearly so where the principal debtor is a nonresident of the state.

In that class of cases another rule of public policy is to be considered, and that is that the state owes it to its own citizens to provide appropriate remedies by which home creditors may subject the assets or effects of nonresident debtors to the payment of their debts. The general rule is that a foreign personal representative or guardian cannot be sued out of the jurisdiction in which he qualified, because his duties are considered as strictly local; yet, under special circumstances, in order to protect home creditors, the general rule gives away, and our courts take jurisdiction of suits against them, as was done in Tunstall *v.* Pollard's Adm'r, 11 Leigh, 1, and in Clendenning *v.* Conrad, 91 Va. 410, 21 S. E. 818. The ground upon which our courts take jurisdiction in such cases is that it is the duty of every sovereignty to provide for the security of its own people. Our attachment laws against nonresident debtors having assets or effects in this state are based upon the same principle, and

give creditors the right to subject such assets or effects to the payment of their debts in suits upon constructive notice, in violation of the general rule that all parties sued are entitled to personal notice.

Upon the facts of this case little inconvenience and no prejudice can result to the city of Portsmouth by holding it liable to garnishment. The work undertaken by the defendants for the city has been completed. The city has retained, upon notice of the plaintiff's claim, a sum sufficient to meet its demand. The city is making no objection, so far as the record shows, to the proceeding against it. The only objection made is by the defendants, and, if that objection prevails, its effect will be to enable the defendants to withdraw their effects from the state, and compel the plaintiff to abandon its claim, or bring suit in a foreign jurisdiction, remote from the place where the cause of action arose.

We are of opinion that the city of Portsmouth was liable to garnishment, and that the judgment complained of must therefore be reversed and set aside, and the cause remanded to the circuit court for further proceedings.

NOTES.

Municipality Not Liable to Garnishment.—In many cases it has been held that a municipality is in no event liable to be summoned as a garnishee. It is said to be contrary to public policy to permit a public corporation to be harassed in this manner. Buckley *v.* Eckert, 3 Pa. St. 368; City of Erie *v.* Knapp, 29 Pa. St. 173; Burnham *v.* Fond du Lac, 15 Wis. 193; Hadley *v.* Peabody, 13 Gray, 200; Brown *v.* Gates, 15 W. Va. 131; McDougal *v.* Supervisors, 4 Minn. 184; Bradley *v.* Richmond, 6 Vt. 121; Fortune *v.* St. Louis, 23 Mo. 239; Neuer *v.* Fallon, 18 Mo. 277; Memphis *v.* Laski, 9 Heisk. 511; Bank *v.* Dibrell, 3 Sneed, 379; Chicago *v.* Halsey, 25 Ill. 596; Stillman *v.* Isham, 11 Conn. 123; Ward *v.* Hartford Co., 12 Conn. 404; Mayor *v.* Rowland, 26 Ala. 408; Jenks *v.* Township, 45 Iowa 554; Merwin *v.* Chicago, 45 Ill. 133; Burns *v.* Harper, 59 Ill. 21; Millison *v.* Fisk, 43 Ill. 112; Clapp *v.* Walker, 25 Iowa 315; Williams *v.* Boardman, 9 Allen, 470; Pottier & S. Mfg. Co. *v.* Taylor, 3 McArthur, 4; Brown *v.* Finley, 3 McArthur 77; Merrill *v.* Campbell, 49

Wis. 435; Holt *v.* Experience, 26 Ga. 113; McLellan *v.* Young, 54 Ga. 399, 21 Am. Rep. 276; Egerton *v.* Third Municipality, 1 La. Ann. 435; Mayor *v.* Root, 8 Md. 95, 63 Am. Dec. 692; Hawthorn *v.* St. Louis, 11 Mo. 59; Wendell *v.* Pierce, 13 N. H. 502; Brown *v.* Heath, 45 N. H. 168; Buffham *v.* Racine, 26 Wis. 450; Merrill *v.* Campbell, 49 Wis. 536; Wilkinson *v.* Hoffman, 61 Wis. 639.

Contra.—But notwithstanding the fact that permitting an attachment to issue against a municipality undoubtedly cumbers and embarrasses it, it is held in some cases that municipalities may be made garnishee. Pendleton *v.* Perkins, 49 Mo. 565; Rodman *v.* Musselman, 49 Mo. 565; Whidden *v.* Drake, 5 N. H. 13; City Council *v.* Van Dorn, 41 Ala. 505; Smoot *v.* Hart, 33 Ala. 69; Bray *v.* Wallingford, 20 Conn. 416; Jersey City *v.* Horton, 38 N. J. L. 88; Davis *v.* Graves, 38 N. J. L. 104; Wales *v.* Muscatine, 4 Iowa 302; Newark *v.* Funk, 15 Ohio St. 462; Clark *v.* Mobile School Comm'rs, 36 Ala. 621; Wilson *v.* Lewis, 10 R. I. 285.

SPRIGG *et al.*

v.

TOWN OF GARRETT PARK *et al.*

(Court of Appeals of Maryland, June 20, 1899.)

Nuisances—Police Power.—The provision of a charter authorizing the city to regulate privies, and to specify the character of boxes, and other fixtures for them, and to prohibit the construction or maintenance of privy sinks, cesspools, and other depositories of filth within the corporate limits, is a constitutional exercise of the police power of the state; and is not obnoxious to the provisions of the federal constitution having reference to the deprivation of property without due process of law.

Same—Same—Summary Suppression.*—Under such provision of its charter, and one authorizing it to suppress and remove all nuisances within the corporate limits, the health officer of the city may be authorized to enter upon private premises and sever the pipes connecting the dwelling house with a privy vault constructed on such premises prior to the passage of an ordinance for the suppression of such vaults, and thereby summarily prevent the use of the vault, and whether or not the use of such a vault constitutes a nuisance is for the city to determine.

*See note at end of case.

Sprigg *v.* Town of Garrett Park

APPEAL by plaintiff from Montgomery county circuit court. *Affirmed.*

Argued before MCSHERRY, C. J., and FOWLER, PAGE, BRISCOE, BOYD, and SCHMUCKER, JJ.

Andrew Wilson and *Noel W. Barksdale*, for appellants.
Philip D. Laird and *Robert B. Peter*, for appellees.

PAGE, J. The bill sets forth that Grace E. Sprigg, in making certain alterations and improvements on her lot situated in the town of Garrett Park, had constructed, at large expense, a vault for the reception of excrement and other waste matter; that the structure "was constructed with the greatest care, of the very best material, and by skilled workmen;" that the method is the best known to and adopted by leading authorities on sanitation, for the disposal of waste matter in suburban residences, and "greatly superior to the use and maintenance of the old-fashioned box privy;" and that it is "so constructed that no stenches, odors, gases, or foul vapor can escape, and no waters or liquids of any kind can leak through its walls of masonry." It is further alleged that the council of Garrett Park, on the 27th day of May, passed an order directing the complainant to "suppress or remove" the said structure, and, in the event of her failure so to do, the health officer was directed to suppress the same; that later on the council by its officers entered upon the premises, and destroyed the pipes leading from the dwelling house to the vault, so as to render the latter useless. The complainants charge that such acts on the part of the council are illegal, unconstitutional, and unjust, and therefore pray that it may be enjoined from further molesting the vault or its connections, and from further interfering with them in the use, enjoyment, and reparation thereof. They also pray that so much of the charter of the town, and the ordinances under which it has acted, "as relates to these complainants and the use of their property, be declared unconstitutional, null, and void." The respondent admits having disconnected the appellants' pipe leading from the dwelling to the vault,

Case Stated.

but claims it had power so to do under and in accordance with the provisions of the charter of Garrett Park and of ordinances passed in pursuance thereof. It also avers that the vault as constructed is unsafe and insufficient for the purposes for which it was made, and is a menace to the health and comfort of the community. A large amount of evidence was taken, much of which, relating to the plan of the vault, the material used, and the details of its construction, it will not be necessary to refer to in detail. The following facts seem to be either conceded or to be established by the proof: The appellant Grace Sprigg became the owner of the lot in the year 1897. The alterations and improvements were begun in January following, and the vault was completed somewhere about the 20th day of March. The act incorporating Garrett Park, being chapter 453 of the Acts of 1898, was approved on the 7th of April. By the thirteenth section of this act, power is conferred on the council to pass such ordinances "as may be necessary, beneficial and proper: * * * (2) to maintain its cleanliness and health, and to this end (a) they shall have the same powers as the state board of health of this state within the corporate limits of said town," etc. "(c) They shall have full power to regulate privies, specify the character of boxes, and other fixtures for them, and the mode in which they shall be emptied and their contents removed, as well as the disposition of said contents, and they shall prohibit the construction or maintenance of privy sinks, cesspools and other depositories of filth within the corporate limits. (d) They shall provide for the inspection and cleanliness of all privies, yards, and stores. * * * (g) They shall pass such ordinances as they may deem necessary to preserve the health of the town, suppress and remove all nuisances, prevent the sale of adulterated or decayed food and prohibit any and all business within the corporate limits as shall in their opinion injuriously affect the sanitary condition thereof," etc.

It is contended that the provisions of subdivision (c) are not "a constitutional and reasonable exercise of the police

power possessed by the state with reference to the preservation of the public health." It is not insisted by the complainants that the power of the legislature does not extend over police regulations for the protection of the comfort, health, and morals of the community. Nor is it claimed by the solicitors for the defendant that their power is not without its limitations, in that the regulations made must have reference to the comfort, safety, and welfare of society, and must not conflict with the provisions of the constitution. *In re* Jacobs, 98 N. Y. 98; Slaughter-House Cases, 16 Wall. 36; Cooley, Const. Lim. (4th Ed.) 719. The supreme court of the United States in Mugler *v.* Kansas, 123 U. S. 623, 8 Sup. Ct. 272, said: "If a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution." These principles are well established by many adjudications, and can be supported upon sound reasons of public policy. Now, it cannot be questioned that the disposal of water-closet material and other waste matter is a subject of the greatest importance, wherever many persons are collected in cities or towns. Scientific investigation has demonstrated that there can exist no more prolific source of disease than may arise from the unsanitary disposition of such matter. Gases may arise from insufficiently protected receptacles, and pollute the atmosphere, and deadly fluids, permeating the soil, may fill it with elements dangerous in the highest degree to the health of human beings. For these reasons the most careful attention to the proper disposal of such matter is one of the most imperative of the duties that rest upon the municipal authorities, who are charged with the protection of the public health. The charter imposes upon the council of Garrett Park the power and duty of passing such ordinances as may be appropriate and necessary for this purpose. By subdivision

Nuisances—Police Power.

(c) it has been required of the council to maintain the cleanliness and health of the town by regulating privies, and specifying the character of the boxes, etc., and prohibiting the construction and maintenance of "sinks, cesspools, and other depositories of filth." By the words "other depositories of filth" must be understood such "depositories" as are of the same nature as sinks or cesspools, and we understand that to mean such as are constructed to hold the waste matter, solid and fluid, until they are emptied by natural causes (as by percolation through the soil or by evaporation of the fluid matter) or by artificial means. It is clear the legislature regarded such structures as a menace to the public health. It would be possible, without doubt, to construct a sink or vault that would retain the gases and fluids, but such a structure, as the proof in this case shows, requires a high degree of skill and care. To prevent the construction of imperfect vaults, from which both gases and fluid would escape, to the imminent peril of all persons residing in the vicinity, the legislature has deemed it essential to the public welfare to prohibit the construction and maintenance of all sinks, cesspools, or such depositories. By whom was it to be determined whether such arrangements would be dangerous to the public health? There are many things shown in the proof that could be urged both for and against the contention that it is essential for the public safety to maintain the prohibition. The record is full of testimony, some of it conflicting in the highest degree, as to whether the vault of the complainants may not become speedily so impaired in strength as that both gas and fluid will leak through its masonry; as to whether such vaults are the best arrangements for the disposal of waste; or whether boxes, with dry earth, are not more in accordance with the best principles of sanitary science. Who shall have power to decide such matters for the entire population of the town? The power must reside somewhere, so that all may be bound; else, as was said in Mugler *v.* Kansas, *supra*, "society will be at the mercy of the few, who, regarding their own appetites or

passions only, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please." "Under our system," it is said in the same case, "that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the state, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." In doing this, however, it cannot treat a thing as a nuisance which cannot be one, but it may declare that to be a nuisance which, from its character, may and does become such. Baumgartner *v.* Hasty, 100 Ind. 575; Inhabitants of Watertown *v.* Mayo, 109 Mass. 315. "Generally, it is for the legislature to determine what laws and regulations are needed to protect the public health, and secure the public comfort and safety, and while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends." *In re* Jacobs, 98 N. Y. 98; Tied. Lim. §§ 122, 122a, 122b; Town of Lake View *v.* Rose Hill Cemetery Co., 70 Ill. 191; Lawton *v.* Steele, 152 U. S. 133-144, 14 Sup. Ct. 499.

Nor can it be properly maintained that this subsection of the charter is obnoxious to the provisions of the constitution of the state or of the United States having reference to the deprivation of property without due process of law. These were not intended to and do not impose restraints upon the proper exercise of the police powers by the legislatures of the several states. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Mfg. Co., 115 U. S. 650, 6 Sup. Ct. 252; Singer *v.* State, 72 Md. 466, 19 Atl. 1044. We cannot find, therefore, that the statute is liable to any constitutional objections.

The ordinance under which the town council claims to act, being Ordinance No. 3, was passed on the 18th of May,

1898. By the first section, all premises within the corporate limits must be supplied with privies arranged with water-tight receptacles, wherein is to be used sufficient dry earth or ashes to absorb the fluid portions of the deposit, and no others of a different kind shall be constructed. By the second, it is provided that no person shall construct or maintain "any cesspool, privy, sink, or other depository of filth," except as provided by the first section; a penalty for the violation of the ordinance is established; and it is made the duty of the health officer, "when directed by the council," to suppress or remove any "cesspool, privy, sink or other depository of filth" not constructed in conformity with the requirements of the ordinance. The power of the council to pass this ordinance must be determined by the authority conferred upon them by the legislature, either by express grant or by fair and reasonable intendment. State *v.* Mott, 61 Md. 303. Tested by this rule, it is difficult to perceive how or in what manner it is a departure from the power conferred upon the council by the legislature. The substantial effect of the ordinance is to regulate privies in Garrett Park by specifying the character of the receptacles or boxes, and the mode in which they shall be used, and to prohibit all other depositories of filth. This is a strict compliance with the requirements of the charter, and, being such, there can arise no question as to its reasonableness. The council having done a plain duty, specifically imposed upon them by a valid enactment of the legislature, the courts have no power to set it aside or to declare it null and void. Dill. Mun. Corp. §§ 328–379. Nor was the council under any obligation, before it was passed, to give notice to the parties to be affected of its pendency. New York Health Dept. *v.* Trinity Church, 145 N. Y. 32, 39 N. E. 833; State *v.* Railroad Co., 33 Kan. 176, 5 Pac. 772; Chicago, B. & Q. R. Co. *v.* Nebraska, 170 U. S. 57, 18 Sup. Ct. 513.

On the 27th day of May, the council directed the health officer to serve a notice upon the complainants to "suppress

or remove" the depository of filth on or before the 1st day of June. This having been done, the health officer was ordered, on the 2d of June, "at once to abate the nuisance created by the use of the vault, by severing the connection between the same and the dwelling house," etc. Accordingly, that officer performed the work by severing the pipe and taking from it a section. It thus appears there has been no attempt to destroy the structure. What was done, and what the health officer was ordered to do, was to prevent its being maintained and used as a place for the deposit of filth. Unless the appellants can claim it is a vested right to use the vault in an illegal manner, —or, in other words, can maintain the right to use the vault as a depository of filth, the law to the contrary notwithstanding,—there can be no contention as to whether there was any interference with their rights of property by the suppression of the particular use. Such a claim could not be made, because of the fact that the use was not illegal when the vault was constructed. In the case of Boston Beer Co. *v.* Massachusetts, 97 U. S. 25, the appellant was incorporated "for the purpose of manufacturing malt liquors in all their varieties," and this right included the incidental right to dispose of the liquors manufactured. And it was contended that the police power could not be so exercised as to deprive the corporation of any of the essential rights and privileges which the charter conferred, but it was held that this right cannot be construed as any greater or more sacred than the right any citizen had to manufacture, and that, if the public safety required the discontinuance of any manufacture or traffic, the hand of the legislature could not be stayed by any incidental inconvenience which corporations or individuals may suffer. Com. *v.* Roberts (Mass.) 29 N. E. 522.

Same—Same—Summary Suppression.

There is no question in this case as to the retroactive effect of the ordinance. Mrs. Sprigg having failed to comply with the notice of the 27th of May to cease the maintenance of the vault as a depository of filth, the health officer was ordered to prevent her from so using it by the removal of the con-

nection between the vault and the dwelling. No attempt was made or proposed by the municipality, or by any of its officers or agents, to destroy the structure itself. For the purposes of this case, it may be conceded that the complainants have and can support a vested right to maintain the structure. What is contested now is whether, having such vested interests, it may be used as a depository of filth; that is, whether the complainants can maintain and use it for purposes that are forbidden by the law. Here, as was said in Mugler's Case, *supra*, "the fact to be ascertained is, not whether a place kept and forbidden by the statute is *per se* a nuisance,—that fact being conclusively determined by the statute itself,—but whether the place in question is so kept and maintained."

The only other matter that requires our attention is as to the power of the municipality to order, after notice to the complainant, the summary abatement of the illegal use by the severance of the connecting pipe. After all that has been said, it follows that the provisions of the charter and of the ordinance must be regarded as police regulations, made in good faith, for the purpose of protecting a populous neighborhood against the encroachments of disease. If they are to become effective for the accomplishment of the ends for which they were adopted, there must be the power of prompt application. If it were held that a judicial hearing must be had in every case, no matter how open and notorious the infraction of the law was, in the maintenance and improper use of privy cesspools, sinks, or vaults, the law would become practically inoperative. The municipality has had imposed upon it the care of the public health, and, to enable it to perform that duty efficiently, it has received the powers and privileges of the health officer of the state, with the right to remove nuisances. In addition, it has been enjoined to prohibit cesspools, sinks, and such other receptacles of filth. It could never have been intended by the legislature, when it imposed such duties and conferred

Note

such powers, that it should be powerless to abate an unlawful use of a vault, a sink, or a cesspool until after a judicial hearing had been had. There is no claim made in this case that the council may destroy the structure in order to abate the unlawful use. It may, indeed, be conceded that, the structure having been built before the act was passed, the complainant has a vested right to maintain it. This, however, we are not called upon now to decide, and we must be understood as expressing no opinion here upon such a question. But, even if it be a legal structure, the complainant cannot put it to an illegal use, and, if it be so used the police power of the state is quite sufficient to interfere to prevent it. This power of summary abatement has been sustained in many cases. State *v.* Schlemmer (La.) 8 South. 307; Com. *v.* Roberts (Mass.) 29 N. E. 522; Baumgartner *v.* Hasty, 100 Ind. 575; King *v.* Davenport, 98 Ill. 305; Mugler *v.* Kansas, *supra*; Weil *v.* Ricord, 24 N. J. Eq. 169; Manufacturing Co. *v.* Wales (Del. Ch.) 34 Atl. 902; Deems *v.* City of Baltimore, 80 Md. 164–174, 30 Atl. 648; State *v.* Mott, 61 Md. 298; Boehm's Case, *Id.* 263–265; Am. & Eng. Enc. Law (2d Ed.) tit. "Abatement of Nuisances." It follows that the decree of the court below must be affirmed. Decree affirmed.

NOTE.

Nuisances—Summary Abatement.—The power of the legislature to authorize the summary abatement of nuisances by municipalities is well settled. Baumgartner *v.* Hasty, 100 Ind. 575, 8 Am. & Eng. Corp. Cas. 353, 50 Am. Rep. 830; Illuminating Co. *v.* Grant, 7 N. Y. Supp. 797; King *v.* Davenport, 98 Ill. 305, 38 Am. Rep. 89; Board of Health *v.* Capcutt, 71 Hun (N. Y.) 149.

And a city may take such steps as are necessary to abate the nuisance. Baumgartner *v.* Hasty, 100 Ind. 575, 8 Am. & Eng. Corp. Cas. 353, 50 Am. Rep. 830; Manhattan Mfg. Co. *v.* Van Keuren, 23 N. J. Eq. 255; Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Hart *v.* Mayor, etc., of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; McKibbin *v.* Ft. Smith, 35 Ark. 359; Hubbell *v.* Goodrich, 37 Wis. 84; Harvey *v.* DeWoody, 18 Ark. 252; Fenenback *v.* Turner, 86 Mo. 416, 56 Am. Rep. 437.

CUNNINGHAM

v.

CITY OF GRIFFIN.

(*Supreme Court of Georgia, April 18, 1899.*)

Statutes—Amendments.—When an act amendatory of a city charter expressed in its title the purpose of such act to be to amend the charter "so as to authorize the establishment of a city court," etc., the last was constitutionally amended by the passage of a third act, which, in its title, recited that the amendatory act was to be amended "so as to change the name of said court, etc.; and the body of the third act declared that such court should thereafter be known as the "Criminal Court" of said city, etc. It is not essential that the last act should undertake, in terms, to amend the title of the act it sought to amend.

Municipal Corporations—Power to Prohibit Sale of Intoxicating Liquors.*—Under a clause in a city charter conferring power on the municipal authorities to adopt such ordinances as they may deem proper "to secure order and quiet in the city," and "to protect the morals of the city," the mayor and council have authority to adopt an ordinance making it an offense against the municipality to "keep for sale, barter, or exchange, any vinous, spirituous or malt liquors within the corporate limits of the city."

Witnesses—Competency.—The competency of a witness introduced for the prosecution in a trial for the violation of such an ordinance is not affected by the fact that his name was not indorsed upon the warrant or accusation.

Case at Bar.—The evidence warranted the conviction, the sentence imposed was not excessive, and the superior court committed no error in overruling the *certiorari*.

(Syllabus by the Court.)

ERROR by defendant from Spalding county superior court. *Affirmed.*

T. E. Patterson, for plaintiff in error.

O. H. P. Slaton, for defendant in error.

*See *notes*, 1 Mun. Corp. Cas. 412 *et seq.*

Cunningham *v.* City of Griffin

LITTLE, J. Plaintiff in error petitioned the judge of the superior court for a *certiorari* to review the rulings of the judge of the criminal court of Griffin made in a case of the mayor and council of Griffin against himself. In the trial of that case he was adjudged to have been guilty of a violation of an ordinance of Griffin which prohibited any person from keeping for sale, barter, or exchange any vinous, spirituous, or malt liquors within the corporate limits of the city of Griffin. The writ of *certiorari* was ordered to issue. The answer of the judge of the criminal court sets out the following as an ordinance of the city of Griffin, to wit: "Be it enacted that, from and after the passage of this ordinance, it shall be unlawful for any person to keep a 'blind tiger,' or keep for sale, barter, or exchange any vinous, spirituous, or malt liquors, within the corporate limits of the city of Griffin. Any person convicted of a violation of the above ordinance shall be fined in a sum not to exceed $100, or punished by imprisonment in the chain gang for a term not to exceed 60 days,—either or both, in the discretion of the court." The warrant charged the defendant with a violation of this ordinance. He appeared, and pleaded to the jurisdiction of the court, on the ground that the act establishing it was unconstitutional. This plea was overruled. The defendant then demurred to the warrant because it charged no offense against him; that the municipal authorities of Griffin had no authority to adopt the ordinance in question, because the offense, as charged, was an attempt to commit a misdemeanor; because the municipal authorities have only the right to regulate the sale of liquors, etc. The demurrer was overruled. The answer then sets out evidence which affirmatively shows that the defendant had sold whisky in the city of Griffin about the time charged in the warrant. Defendant was adjudged to be guilty, and sentenced to work on the chain gang for 60 days, or to be discharged on the payment of a fine of $100. On the hearing the *certiorari* was overruled by the judge of the superior court, and to this action defendant excepted.

Case Stated.

Cunningham *v.* City of Griffin

1. An act of the legislature approved February 15, 1876, (Acts 1876, p. 142), in effect, created a new charter for the city of Griffin which had been originally incorporated in 1843. This act was amended by an act approved December 3, 1880, the title to which is, "An act to amend the charter of the city of Griffin, so as to authorize the establishment of a city court in said city, to define the jurisdiction of the same, and for other purposes." Acts 1880–81, p. 375. This latter act was amended by an act approved December 16, 1897 (Acts 1897, p. 481), the title of which is, "An act entitled 'An act to amend the charter of the city of Griffin so as to establish a city court in said city,' " etc., " * * * so as to change the name of said court," etc. Section 2 of this amending act authorizes the establishment of a court in said city, to be known as the "Criminal Court of Griffin." Section 4 of the act, besides the grant of other jurisdiction, gives to this court exclusive jurisdiction of all violations of the ordinances of the city. Counsel for plaintiff in error insists that the act of 1897 is unconstitutional, because the caption differs from the body of the act, the caption of the original act not having been amended. We are unable to see the force of this contention. The act of 1880 provided for the creation of a city court in Griffin. The caption to that act was in consonance with its body, and was entitled "An act to amend the charter of the city of Griffin so as to authorize the establishment of a city court," etc. The caption of the act of 1897 recites that it is an act to amend the act of 1880 so as to change the name of the court created by that act. Such legislation, we think, was regular, constitutional, and legally accomplished the purpose for which it was intended. It was not necessary for the caption of the original act to have been changed or amended. The act provided for the creation of a city court, as was indicated by its title. The amendatory act, by its title, clearly expressed that the object of the amending act was to change the name of the court. Statutes—Amendments.

2. It is further contended that the municipal authorities

of Griffin had no power to pass the ordinance for the violation of which the plaintiff in error was tried and convicted. We find no merit in this contention. By section 14 of the act incorporating the city of Griffin (Acts 1876, p. 142), power is expressly given to the mayor and council of the city "to adopt such ordinances and regulations as they may deem proper * * * to secure order and quiet in the city, * * * to protect the health of the city * * * to protect the morals of the city," etc. This is what is denominated a "general welfare clause," and by its terms very full power is conferred on the municipal authorities to legislate for the general welfare of the inhabitants of the city. The point raised by the plaintiff in error was made, and expressly ruled on, in the cases of Paulk *v.* Mayor, etc. (Ga.) 31 S. E. 200, and Brown *v.* Town of Social Circle (Ga.) 32 S. E. 141, 1 Mun. Corp. Cas. 411. The doctrine that, under such a general welfare clause in the act incorporating the city, the municipal authorities are invested with power to pass such ordinances, cannot now be questioned.

Municipal Corporations—Power to Prohibit Sale of Intoxicating Liquors.

3. On the trial, objection was made to receiving the testimony of a witness for the state whose name was not indorsed on the warrant. We know of no rule of law which makes the competency of a witness depend upon the fact that his name is indorsed as a witness on the warrant or accusation. No authority to support such a contention was shown.

Witnesses—Competency.

4. The evidence fully sustained the conviction. The plaintiff in error was fined the sum of $100, which was the limit imposed by the ordinance of the city. We have no disposition to control the discretion of the trial judge in imposing sentences on persons convicted of offenses of this character. Certainly in this cause there is no reason to do so. The judge of the superior court committed no error in overruling the *certiorari*, and his judgment is affirmed. All the justices concurring.

Case at Bar.

EWART *et al.*

v.

VILLAGE OF WESTERN SPRINGS.

(*Supreme Court of Illinois, June 17, 1899.*)

Electric Light Plants—Special Assessments.*—A municipality may provide for the payment by special assessment for so much of a plant for lighting its streets by electricity as relates to the placing, erection and construction of poles, electric conductors, street-lamps, and all appurtenances thereto belonging, not included in the power house or the generator plant.

Ordinance—Description of Improvements.—An ordinance providing for improvements was not defective because it designated one of the streets upon which they should be located as "Forty-Seventh street (South boulevard)," it appearing from the evidence that the street was known by both names.

Evidence.—Where there were two assessments and two hearings, but the proceedings or suit was a single proceeding or suit, it was not necessary to reintroduce at the second hearing testimony which had been given at the first hearing.

Ordinance—Improvements—Description.—It is not necessary to describe the exact locality of a municipal public building, whose location is known, in an ordinance providing for public improvements.

Same—Same—Same.—When an ordinance provides "that a system of electric conductors and poles provided with street lamps be built" in the streets of the village, the use of the word "system" implies that the wires are connected with the power house.

Same—Same—Same.—The specifications for the material to be used in the construction of an electric light plant are sufficiently specific and certain as they are set forth in the ordinance of appellee.

Assessments—Disqualification of Commissioner—Petitions.—Under the laws of Illinois, where an assessment for municipal improvements is set aside, not on account of a defective ordinance, but on account of the disqualification of one of the commissioners appointed, it is not necessary to file a new petition.

Same — Report of Commissioners — Statutory Requirement.—Where the board of trustees of a village have ordered that court

*See note at end of case.

proceedings be instituted to assess the cost of improvements in accordance with the report of the commissioners, it will be presumed that such report was "approved" by the board; and the fact that the minutes of the board show merely that the report was "accepted" is immaterial, although it is required by law that the report should be "approved."

Objections to Evidence.—An objection to the introduction in evidence of the clerk's certificate attached to an ordinance, upon the ground that it is defective, must, in order to be considered, specify the defect relied on.

APPEAL by abutters from Cook county court. *Affirmed.*

This is a proceeding commenced in the county court of Cook county by the appellee, the village of Western Springs, by the filing of its petition therein on June 24, 1897, for the confirmation of a special assessment to pay the cost of constructing a plant for street lighting in that village by electric light, including power house, electric generator engine, poles, electric conductors and lamps, and necessary appurtenances. Objections were filed by the appellants to the confirmation of the assessment; a hearing was had thereon in the latter part of November, 1897; and on December 3, 1897, the county court entered an order sustaining one of the objections to the assessment. The objection so sustained was that one of the commissioners appointed to levy the assessment was the owner of property assessed therein. The court held that said objection was valid, and ordered that, by reason thereof, the assessment be annulled and set aside, and the application to confirm it be denied. In the same order the court, upon the application of the petitioner, the village, reduced the amount of the assessment 25 per cent. from the total estimated cost thereof, and appointed new commissioners to make a new assessment. The original assessment was for $6,000, but on December 31, 1897, a new assessment roll was made for $4,500 and filed. Objections were also filed by the same objectors to the new assessment. On February 5, 1898, a hearing was had upon the objections filed to the new assessment, and on February 9, 1898, the county court entered an order overruling all of

Case Stated.

the objections, to which order exception was taken. A jury was called and sworn, and a verdict rendered by them in favor of the appellee, the village, that the property of the appellants was not assessed more than it was benefited, nor more or less than its proportional share of the cost of the improvement. Judgment was thereupon entered confirming the assessment, and the present appeal is from such judgment of confirmation.

Edward F. Gorton and *George W. Brown*, for appellants William D. Ewart, Link Belt Machinery Co., and Lula S. Knowlson.

W. P. Quimby, for appellant Western Springs Land Ass'n.

Williams, Holt & Wheeler, for appellant Marshall Field.

Frederick A. Willoughby, for appellee.

MAGRUDER, J. (after stating the facts). 1. A general objection is made by the appellants to the effect that the municipality has not the power or authority to make the proposed improvement. More specifically stated, this objection is that the power to light the village cannot be exercised by way of special assessment. The contention of appellants is that such an improvement as the ordinance in this case contemplates is not a local improvement, within the meaning of the constitution and the statute, and that, therefore, its cost cannot be assessed upon the property alleged to be benefited thereby. In Hughes *v.* City of Momence, 163 Ill. 535, 45 N. E. 300, we held that the cost of constructing a reservoir, sinking a well, erecting a standpipe and pumping works, and buildings for the same, with a view of constructing waterworks in a city, were not local improvements, but were of general utility to the inhabitants of the city, and must be paid for by general taxation. In the same case, however, it was held that the laying of pipes for the conveyance of water along particular streets was local to the particular streets on which such pipes were laid, and of special benefit to the property thereon, and was therefore a local improvement, which could be paid for by special assessment

or special taxation. In O'Neil *v.* People, 166 Ill. 561, 46 N. E. 1096, it was held that, where an ordinance provides for the construction of a system of waterworks, the construction of the standpipe, engine house, etc., is an improvement that is general, and not local, in its character; but, where such ordinance contemplates the construction merely of reservoirs, fire hydrants, and water mains, these latter are local improvements, and may be paid for by special assessment. Again, in Hewes *v.* Glos, 170 Ill. 436, 48 N. E. 922, it was held that, where corporate authorities attempt to construct a general waterworks system for fire protection and general uses by special assessment, such an improvement is not local in its character, and an assessment for such a purpose ought not to be confirmed by the court; but that a city or village has the power to provide for a system of waterworks for fire protection and for the use of the inhabitants, and that the laying of water-main pipes for the distribution of water along particular streets for the use of the inhabitants is a local improvement, for which a special assessment can be levied. In Harts *v.* People, 171 Ill. 458, 49 N. E. 538, it was again held that the construction of reservoirs, fire hydrants, and water mains is a local improvement, which can be paid for by special assessment, but, where an ordinance contemplates the erection of a city hall, pumping works, pumps, and standpipes, that such structures are improvements of a general character, and not local improvements, within the meaning of the law. These cases draw a distinction, so far as the construction of systems of waterworks are concerned, between the standpipe, pumping works, and buildings, which are of general utility, and the pipes, which convey the water along particular streets. The former must be paid for by general taxation, but the latter are held to be local improvements, which may be paid for by special assessment.

If the water mains and hydrants of a system of waterworks, which extend along the streets of a city, are a local improvement, we see no reason why the poles, wires, and lamps in an electric light system are not also a local

improvement. So far as the plant for lighting the streets by electricity includes the power house and electric generator engine, the latter may be regarded as improvements of general utility, and as not coming within the legal definition of local improvements." But the poles, wires, and lamps in an electric light system are the means of furnishing the necessary light for the protection of the property of the citizens, just as the water mains and hydrants of a system of waterworks are the means of furnishing needed water for fire protection and other uses of the citizens. It cannot be said that property upon a street lighted with electric light is not more valuable than property upon a street where there is no such electric light. Property is in fact specially benefited by electric or other adequate lighting along the street on which it is situated, quite as much as it is benefited by water mains. It follows that, if water mains are local improvements, poles and wires in an electric light system are also local improvements. The former are conduits for water; the latter, for electricity. So, also, it must be said that, if hydrants attached to the water mains are a local improvement, lamps attached to the wires in an electric lighting system are local improvements, because the latter are the means of using the electricity, as the former are the means of using the water. The test whether an improvement is local or not depends upon the question whether or not it specially benefits the property assessed. The improvement which consists in the erection of poles, wires, and lamps in an electric light system is certainly as much a permanent improvement as the water mains and hydrants in a system of waterworks. City of Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829; Carpenter *v.* Electric Co., 178 Ill. 29, 52 N. E. 973.

Sections 2 and 3 of the ordinance in the case at bar conform to the rule laid down in the cases above referred to. Section 2 of the ordinance provides that so much of the improvement as relates to the power house and generator plant, including engine, generator, and all appurtenances located at the power house, shall be paid for by general taxation. Section

3 provides that so much of the improvement as relates and refers to the placing, erection, and construction of poles, electric conductors, street lamps, and all appurtenances thereto belonging, not included in said power house or the generator plant located at said power house, shall be made, and the cost thereof shall be paid for, by special assessment to be levied upon the property benefited thereby. We are therefore of the opinion that the village had the power, under the law, to make the proposed improvement in the manner set forth in the ordinance, and that the county court committed no error in overruling the objections alleging the want of such power.

2. Several technical objections were made by the appellants to the confirmation of the assessment, which were not improperly overruled. The ordinance provides "that lines of poles and conductors be placed upon streets of the village as follows: Forty-Seventh street (South boulevard), from the power station at the waterworks pump house to East boulevard; Prairie avenue, from Forty-Seventh street to Burlington street; Park avenue, from Forty-Seventh street to Burlington street; Lawn avenue, from Forty-Seventh street to Burlington street." It is claimed that the ordinance is uncertain and insufficient "in the specification of the nature, character, locality, and description of said improvement," upon the alleged ground that, according to the map introduced in evidence, neither Prairie, Park, nor Lawn avenue runs to Forty-Seventh street, but to South boulevard. It is said to be impossible to tell, from the description in the ordinance, which street is really intended,—Forty-Seventh street or South boulevard,—and that, in this respect, the ordinance is fatally defective on an application for confirmation. Steenberg *v.* People, 164 Ill. 478, 45 N. E. 970; Sanger *v.* City of Chicago, 169 Ill. 286, 48 N. E. 309.

Ordinance—Description of Improvements.

It appears from the map introduced in evidence that Forty-Seventh street runs east and west, and that Forty-Seventh street, from the east limits of the village to the east

side of East boulevard, is called "Forty-Seventh Street," but that it is called "South Boulevard" from the west side or East boulevard to the west limits of the village. East boulevard, which is 66 feet wide, runs between and separates what is called on the map "Forty-Seventh Street" from the part which is called "South Boulevard." Prairie, Park, and Lawn avenues run to the street called upon the map "South Boulevard," and it is contended that they are incorrectly described in the ordinance as running from Forty-Seventh street instead of South boulevard. The ordinance itself, by putting the words "South boulevard" in parentheses alongside of the words "Forty-Seventh street," would seem to indicate that Forty-Seventh street and South boulevard are the same street. But, whether this is so or not, the certificate of evidence contains the testimony of one Benezette Williams, the president of the board of trustees of the village, who swears that he has lived in Western Springs 18 years, and is acquainted with the street in question, and that the street known as "Forty-Seventh Street" is a continuation of Forty-Seventh street of the city of Chicago, and is known as "Forty-Seventh Street" in the villages of Lagrange and Western Springs; that "South Boulevard" is merely another name for Forty-Seventh street; that, as shown on the map, Forty-Seventh street and South boulevard are the same street, and are identical the one with the other; and that the street is known more by the name of "Forty-Seventh Street" through its entire length as it runs through the village. We think it sufficiently appears from this testimony that the ordinance, in describing Prairie, Park, and Lawn avenues as starting from Forty-Seventh street, really and in effect describes them as starting from South boulevard.

Counsel for appellants, however, make the objection that the testimony of Williams was introduced in support of the objections made upon the first hearing, in December, 1897, and not in support of the objections made upon the last hearing, in February, 1898. This objection is without force. The testimony in support of the

Evidence.

objections was addressed to the court, and is in the record, and is a part of the bill of exceptions. It was not necessary to reintroduce the witness Williams upon the second hearing as to this point. It is true that there were two assessments, but the proceeding or suit was a single proceeding or suit, beginning with the filing of the petition and ending with final judgment in the case. The objection in support of which the testimony was introduced was not passed upon at the first hearing, but was still pending when the second hearing began.

It is further said that the ordinance is indefinite in the description of the improvement, because it does not state where the power house is located, or that the lines of wires and poles connect with each other. The ordinance was not defective in this respect. The waterworks pump house is a public building, whose location is known, and it is not necessary to describe its exact locality in the ordinance. When the ordinance provides "that a system of electric conductors and poles provided with street lamps be built in the streets of said village, located upon said streets as hereinafter specified," the use of the word "system" implies that the wires are connected with the power house.

Ordinance—Improvements—Description.

Same—Same—Same.

It is also claimed that the specifications for the material used in the construction of the plant are not sufficiently specific and certain, as they are set forth in the ordinance. Upon this subject the appellants, in support of their objections, introduced one expert witness, and the appellee, the village, introduced two expert witnesses. The latter testified that the descriptions in the specifications of the poles and wires and electric generator and insulators were sufficiently accurate and specific to enable the commissioners to estimate their cost. We see no reason for holding that the court below erred in giving credence to the testimony introduced upon this subject by the village. We cannot follow counsel through all the

Same—Same—Same.

minute objections which they make to the description of the poles, conductors, insulators, lamps, etc. We will only notice one or two of these objections. The ordinance says that the poles are "to be white cedar, generally thirty feet in length and six inches in diameter at the tops, and, wherever necessary, greater lengths to be used, to be of quality to conform to the Western Union Telegraph Company standard specifications. They are to be solidly set five feet in the ground, and one hundred and twenty-five feet apart, or thereabouts, in such manner as to be adapted to the conditions of the streets." It is objected to this description that, while the diameter of the poles at the tops is given, their diameter at the bottoms is not stated. Expert witnesses, introduced by the appellee, testified that, when the diameter of the top of a pole is given, it is a sufficient statement of what the diameter of the bottom of the pole should be. One of these witnesses says: "Top diameter of six inches determines approximately size of bottom in cedar poles.

It is also said that the use of the words, "or thereabouts," leaves it discretionary with the contractor to put poles 125 feet apart, or at any other distance apart. The expert witnesses say that this expression is necessarily used, because streets and railway crossings are sometimes in the way, so that it is not possible always to put the poles at the distance of exactly 125 feet apart.

So, in regard to the wires, the ordinance states that the conductors are "to be a round copper wire, covered with weather-proof insulation, and of such size that the loss between the electric generators and the furthest outlet shall not exceed five per cent., no wire being smaller than No. 10, Brown & Sharp gauge." The expert witnesses testify that this description is specific enough to enable the commissioners to estimate the cost; that "the loss between the electric generators and the furthest outlet shall not exceed five per cent." is an expression which means that wire must be used which will carry the current without loss of more than 5 per cent. from its resistance; and that any wire would

comply with this specification if it did not cause a loss of over 5 per cent. We forbear to discuss the objections thus made to the descriptions of the wires, poles, and insulators any further. We are of the opinion that the descriptions were not defective as not being sufficiently specific.

3. It is further contended by the appellants that, when the county court annulled the first assessment on account of the disqualification of one of the commissioners, it put an end to the entire proceeding, and that, when the new commissioners presented the new assessment roll, it was necessary for the village to file a new petition, and give new notices, as was done when the original assessment roll was reported. In making this objection, counsel applies section 46 of article 9 of the city and village act to the present case. Section 46 provides that, "if any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had, as herein required in relation to the first; and all parties in interest shall have the like rights, and the city council, or board of trustees, and court, shall perform like duties, and have like power in relation to any subsequent assessment, as are hereby given in relation to the first assessment." 1 Starr & C. Ann. St. (2d Ed.) p. 775. Section 46 has reference to such assessments as have been set aside by the legislative authority of the city or village, or by some court, after they have once become in fact assessments by the order of the county court. The setting aside mentioned in section 46 is one which takes place subsequently to the confirmation of the assessment. Here, however, the action of the court was taken under and in pursuance of section 33 of said article 9. 1 Starr & C. Ann. St. (2d Ed.) p. 768. Section 33 provides that "the court, before which any such proceeding may be pending, shall have authority, at any time before final judgment, to modify, alter, change, annul or confirm any assessment returned, as afore-

Assessments—Disqualification of Commissioner—Petitions.

said, or cause any such assessment to be re-cast by the same commissioners whenever it shall be necessary for the attainment of justice, or may appoint other commissioners in the place of all or any of the commissioners first appointed, for the purpose of making such assessment, or modifying, altering, changing or re-casting the same, and may take all such proceedings and make all such orders as may be necessary to make a true and just assessment of the cost of such improvement according to the principles of this act, and may from time to time, as may be necessary, continue the application for that purpose as to the whole or any part of the premises." Section 33 authorizes the court to annul an assessment which is returned. The court here annulled the assessment then before it on account of the disqualification of one of the commissioners, and ordered new commissioners to be appointed to prepare an assessment, which should be made in the manner prescribed by law. Although the assessment was changed, yet the proceeding was the same. The proceeding does not consist merely of the assessment roll itself, but the assessment roll is merely a part of the suit, begun by the petition, which is filed to secure from the county court an assessment in the manner prescribed by law. Although section 33 authorizes the court to modify, alter, change, or annul the assessment, or cause it to be recast by the same commissioners, or to appoint other commissioners for the purpose of making a new assessment, yet the proceeding, begun by the filing of the petition, is not thereby ended. The assessment roll is merely changed under the order of the court, and, when it is again reported, the court acts upon the new assessment without the necessity of causing a new petition to be filed and a new proceeding to be instituted. Where an assessment is set aside, as was done here, not on account of a defective ordinance, but on account of a disqualified commissioner, it is not necessary to file a new petition. The ordinance remains unrepealed and unchanged, and the difficulty lies only in the fact that one of the commissioners is,

technically disqualified to act. Section 33 expressly provides that the application may be continued from time to time, as may be necessary. The case here was still continued in court after the order for the appointment of the new commissioners. Therefore the law as it stood when the petition was filed in June, 1897, and not the law of 1897, which went into effect on July 1, 1897, was applicable to the proceedings subsequently taken.

4. It is further claimed by the appellants that the board of trustees of the village of Western Springs did not approve the report of the commissioners appointed to estimate the cost of the improvement. We do not think that there is any force in this objection. Counsel for the village introduced a certified copy of a part of the minutes of a meeting of the board of trustees of the village, held on June 18, 1897; and these minutes show that the report of the commissioners, appointed on June 8, 1897, to make an estimate of the cost of constructing an electric light system in the village, was read and accepted, and that the village attorney was, on motion of the trustees, instructed to take the ordinance into court as soon as possible. The word "accepted" must here be regarded as equivalent to the word "approved," because the board ordered court proceedings to be instituted, and this would not have been done, unless the report of the commissioners was approved. Section 21 of article 9 provides that, "on such report being made, and approved by the council or board of trustees, as the case may be, it may order a petition to be filed by such officer as it shall direct in the county court of its county for proceedings to assess the cost of such improvement in the manner provided in this act." 1 Starr & C. Ann. St. (2d Ed.) p. 757. It will be presumed that the board of trustees did their duty, in accordance with the law, until the contrary is shown; and, having ordered that court proceedings be instituted, it will be presumed that the report of the commissioners was approved.

Same—Report of Commissioners—Statutory Requirement.

It is said, however, that the certificate of the village clerk to the extract from the minutes, as well as the certificate attached to the ordinance introduced in evidence, was defective. The village clerk certifies, in his certificate, "that the foregoing is a true and correct extract of a part of the minutes of a meeting of the board of trustees of the village of Western Springs, Ill., held June 18, 1897." To this certificate is attached the corporate seal of the village. Section 10 of article 6 of the city and village act provides that "the clerk shall keep the corporate seal, to be provided under the direction of the city council or board of trustees, and all papers belonging to the city or village; he shall attend all meetings of the city council or board of trustees, and keep a full record of its proceedings in the journal; and copies of all papers duly filed in his office, and transcripts from the journals and other records and files in his office, certified by him under the corporate seal, shall be evidence in all courts in like manner as if the originals were produced." 1 Starr & C. Ann. St. (2d Ed.) p. 724. The certificate of the village clerk in the case at bar conforms to the requirements of section 10.

Objections to Evidence.

Counsel for appellants, however, refer to sections 14 and 16 of chapter 51 of the Revised Statutes, entitled "Evidence." Said section 16 provides that "the certificate of any such clerk of a court, city, village, town, county, or secretary, clerk, cashier, or other keeper of any such papers, entries, records or ordinances, shall contain a statement that such person is the keeper of the same, and if there is no seal, shall so state." 2 Starr & C. Ann. St. (2d Ed.) p. 1846. The objection made to the present certificate is that it does not state that the clerk is the keeper of the records of the village, as seems to be required by said section 16. We do not wish to be understood as passing any opinion upon the question whether or not the certificate in the present case is defective in the respect thus indicated. It is sufficient to say that when, upon the trial below, the certified copy of the

Note

extract from the minutes of the board of trustees and the certified copy of the ordinance were introduced, the objection made thereto by counsel for appellants was general in its character. Such objection did not state in what respect the certificate was regarded as defective. If the objection had specified the absence of a statement in the certificate that the clerk was the keeper of the records of the village, the defect might have been remedied by the obtaining of a new certificate from the clerk. An objection of this character to the introduction of the certified copy of a document is too general, as it fails to point out the specific defect insisted upon. Payne *v.* Village of South Springfield, 161 Ill. 285, 44 N. E. 105. For this reason the court below committed no error in admitting the certified copies against the objection made by counsel for appellants.

Some other objections are urged upon our attention by appellants, but they are of a mere technical character, and we do not deem it necessary to discuss them. After a careful examination of the record, we are of the opinion that the court below committed no error in overruling the objections. Accordingly the judgment of the county court is affirmed. Judgment affirmed.

PHILLIPS, J., dissents.

NOTE.

Lighting Streets—Local Assessments.—Though it is not usual to assess the property benefited with the cost of lighting the streets, it seems that it may be done. Jonas *v.* Cincinnati, 18 Ohio 318.

LESLIE *et al.*

v.

KITE *et al.*

(*Supreme Court of Pennsylvania, July 19, 1899.*)

Municipal Powers.*—A municipal corporation does not possess and cannot exercise any powers except those expressly granted, those necessarily or fairly implied in or incident to those expressly granted, and those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.

Same—Claims against Contractors.—A city council cannot create a remedy in the nature of an attachment, lien, or trust of any kind, whereby a subcontractor may enforce payment of his claim out of money due the principal contractor by the city.

APPEAL by plaintiffs from Philadelphia county court of common pleas. *Affirmed.*

John Scott, Jr., *Henry P. Brown*, *John A. Siner*, *Joseph J. Broadhurst*, and *John G. Johnson*, for appellants.

Wm. Findlay Brown, for appellees.

STERRETT, C. J. This bill, against J. Sellers Kite & Co. and others, was filed by the plaintiffs on behalf of themselves and of all other creditors who, on account of the subject-matter thereof, might join therein and contribute to the expenses thereof. After making certain averments of fact, as the basis of their claim for equitable relief, the plaintiffs pray that a suitable person be appointed to act as receiver of the fund now in the hands of the city, and for other purposes thereinafter set forth, and that the court will order and direct "(1) that said J. Sellers Kite & Co. shall, in conjunction with said receiver so to be appointed, collect said final estimate under said contract for the benefit of the claimants thereon who have filed their

Case Stated.

*See notes at end of case.

claims as aforesaid, and shall make and deliver to the city of Philadelphia due and proper receipts and releases therefor; (2) that said J. Sellers Kite & Co. shall make and deliver to the city of Philadelphia due and proper receipts for the warrant so to be received from said city for said final estimate, and shall indorse and deliver the same to said receiver, so that the same may be collected and proceeds thereof be received by him; (3) that said receiver shall, out of the fund so received, after deducting the costs, including fees of the receiver, pay the claims of the plaintiffs and other material men, as filed, with interest, so far as said fund may be sufficient, upon receipt of full releases and discharges to the city of Philadelphia and to the defendants, to the extent to which said claims may be paid, and shall pay over any balance thereof unto the said J. Sellers Kite & Co., or their order; (4) general relief."

The averments of fact referred to as constituting the grounds of equitable relief on which the plaintiffs rely are fully set forth in the bill, paragraphs 1 to 11, inclusive, and need not be recited here. The sole foundation of their claim, however, is stated in paragraph 4, thus: "The city of Philadelphia, by its ordinance approved June 27, 1895, did authorize and direct the director of public works of said city to enter into certain contracts for the construction of certain main sewers, *inter alia*, on Allegheny avenue, from the end of the present sewer west of Edgemont street to the Aramingo Canal. A copy of said ordinance is attached hereto, marked 'Exhibit A.' By section 3 of said ordinance it is provided: 'The director of public works shall give one month's notice of the date of final payment, and satisfactory evidence shall be furnished that full compensation has been made for all labor done and materials furnished previous to drawing warrant for final payment.'" It is upon this section that the plaintiffs rely, in connection with the fact that they furnished labor and materials to J. Sellers Kite & Co., the contractors with the city for the construction of said main sewer, which labor and materials went into said construction,

and have never been fully paid for by said contractors. The ordinance referred to is a general ordinance, containing four sections. The first authorizes the construction of several main sewers, including the one above mentioned, which the defendants J. Sellers Kite & Co. afterwards contracted to build; the second section authorized the director of public works to advertise for proposals and award contracts; the third is quoted in full above; and the fourth authorized the mayor to enter security for damages resulting to private property from the construction of said sewers. The contract awarded to J. Sellers Kite & Co. for the sewer above mentioned, although dated August 27, 1895, was not fully executed until it was sanctioned by councils and security approved by ordinance dated October 25, 1895. In the contract thus fully executed and approved the time and terms of payment are essentially different from provisions of the ordinance on which appellants rely. It provides, *inter alia*, that "final and full payment of the balance due to the contractor for main sewers, after all legal and equitable deductions, will be made upon the acceptance and approval of the director of the department of public works one month after the date of completion, and to the contractor for branch sewers immediately after the date of the satisfactory completion, provided the whole work and each of its parts, including the streets, be in perfect order." No special reference is made therein to the third section of the ordinance of June 27, 1895, or to its provisions. Nor is any reference made to the ordinance itself, except in the use of the words, "as authorized by ordinance approved June 27, 1895"; and these words evidently refer only to the location and extent of the sewers to be constructed. The defendants demurred on the ground that "upon the face of the bill complainants are not entitled to the relief claimed, and have a full, complete, and adequate remedy at law for all things and matters complained of in said bill of complaint." After hearing and consideration of the demurrer, the learned court below, without filing any opinion, entered a decree sustaining the same

and dismissing the bill. From that decree this appeal was taken.

The specifications of error are necessarily restricted to the two questions suggested by the decree. If the court was right in sustaining the demurrer, it must be conceded that dismissal of the bill followed as a matter of course. We have fully considered the positions taken and so ably discussed by the learned counsel for appellants, but we are not convinced that there is any error in the decree that requires a reversal or modification thereof. On the contrary, we are of opinion that the conclusion reached by the learned court below is correct. It is not our purpose, nor is it necessary, to discuss at length the questions presented by the record.

There is much force in the contention of appellees' counsel that the third section of the ordinance of June 27, 1895, was impliedly repealed by the ordinance of October 25, 1895, approving the contractor's sureties, and giving the necessary consent of the city to the contract, then and there finally executed, as it now appears. While the contract thus finally executed by all the parties thereto distinctly specifies time and terms of payment different from the provisions of said third section, we are not prepared to say that there is such irreconcilable conflict as to warrant the conclusion that said section was impliedly repealed by the ordinance of October 25, 1895. Properly construed, the third section of the ordinance relied on by appellants never created, nor was it intended to create, any contractual or other relation, between the city and its contractors, for municipal improvements, or subcontractors under the latter, or between any of them, that would authorize the maintenance of any such proceeding as that now under consideration. If it did, it would be clearly *ultra vires* the city councils, and also void, as being manifestly in conflict with sound principles of public policy long recognized and firmly established in this commonwealth. As it appears to us, the only clause in said third section that suggests even a colorable right to maintain such a proceeding as that now under consideration is the following: "And

satisfactory evidence shall be furnished that full compensation has been made for all labor done and materials furnished." We think the attempt to impose this injunction on the director of public works was *ultra vires* and void.

Municipal Powers.

Appellants' contention proceeds upon the erroneous theory that municipal corporations, or the officers thereof, may do anything, not actually forbidden by law, which the caprice of councils, or of executive officers, may consider to be for the interests of the municipality. This is a mistake. Nothing is better settled than that a municipal corporation does not possess and cannot exercise any other than the following powers: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt as to the existence of power is resolved by the courts against its existence in the corporation, and therefore denied. Dill. Mun. Corp. § 89. It is equally well settled that the agents, officers, or city councils of a municipality cannot bind the corporation by any contract not within the scope of its powers. *Id.* § 457. It is unnecessary to multiply authorities for the purpose of showing that city councils have no authority whatever, express or implied, to provide a new remedy in the nature of an attachment, lien, or trust of any kind, whereby sub-contractors may enforce payment of their claim out of money due the principal contractor. On grounds of public policy the legislature has hitherto withheld from contractors and subcontractors, not only the right of lien on public buildings, but also the right of attaching money in the hands of the city. On the same principle, it cannot be successfully contended that councils may by ordinance empower the director of public works to retain money due one of the city's contractors in order that his creditors, who are not parties to the contract, may proceed by bill in equity, or otherwise, against him, and thus have the money

Same—Claims against Contractors.

applied to their claims. In other words, city councils are powerless to provide any remedy to be used as a substitute for attachment of any other remedy which the legislature has heretofore withheld on grounds of public policy, or otherwise. For these and other reasons that might be added, we are clearly of opinion that there was no error in sustaining the demurrer and dismissing the bill. Decree affirmed, and appeal dismissed, at appellants' costs.

NOTE.

Powers of Municipal Corporations.—The analysis of the powers of municipal corporations given in the leading case is that formulated by JUDGE DILLON, and has been cited with approval in numerous cases. See Parish of Ouachita *v.* Monroe (La.), 31 Am. & Eng. Corp. Cas. 273; Bell *v.* Plattville, 71 Wis. 142, 20 Am. & Eng. Corp. Cas. 177; Richards *v.* Town of Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; Brenham *v.* Brenham Water Co., 67 Tex. 542, 20 Am. & Eng. Corp. Cas. 207; St. Louis *v.* Bell Telephone Co., 97 Mo. 623, 25 Am. & Eng. Corp. Cas. 476, 9 Am. St. Rep. 370; Saginaw G. L. Co. *v.* Saginaw, 28 Fed. Rep. 529, 16 Am. & Eng. Corp. Cas. 562; Davenport *v.* Kleinschmidt, 6 Mont. 502, 16 Am. & Eng. Corp. Cas. 301; Logan City *v.* Buck, 3 Utah 301, 4 Am. & Eng. Corp. Cas. 300; Desmond *v.* Jefferson, 10 Fed. Rep. 483, 5 Am. & Eng. Corp. Cas. 565; Gilman *v.* Milwaukee, 61 Wis. 588, 7 Am. & Eng. Corp. Cas. 270; Danville *v.* Shelton, 76 Va. 325, 3 Am. & Eng. Corp. Cas. 458; Kansas City *v.* Swope, 79 Mo. 446, 7 Am. & Eng. Corp. Cas. 501; City of Portland *v.* Schmidt, 13 Ore. 17, 7 Am. & Eng. Corp. Cas. 658; Levy *v.* Salt Lake City, 3 Utah 63, 2 Am. & Eng. Corp. Cas. 611.

VAIL

v.

CITY OF ATTICA.

(*Court of Appeals of Kansas, May 12, 1899.*)

Municipalities Subscribing to Stock of Mining Companies—Constitutionality of Statute.*—"Chapter 114 of the Laws of 1887, entitled 'An act authorizing counties and incorporated cities of the second and third class to encourage the development of the coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purposes,' is unconstitutional and void." City of Geneseo *v.* Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co., 40 Pac. 655, 55 Kan. 358.

(Syllabus by the Court.)

ERROR by plaintiff from Harper county district court. *Affirmed.*

Chester I. Long, for plaintiff in error.

Sankey & Campbell, for defendant in error.

SCHOONOVER, J. This action was commenced by J. W. Vail in the district court of Harper county to recover upon a "prospecting bond" issued by the city of Attica in accordance with an act of the legislature of this state. The bond recites that "this bond is one of a series of six bonds, numbered from one to six, inclusive, of like amount, tenor, and effect, executed and issued by the said city, and in accordance with an act of the legislature of the state of Kansas entitled 'An act authorizing counties and incorporated cities of the second and third class to encourage the development of the coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purposes,' approved March 2d, 1887."

The serious question presented in the constitutionality of

*See note at end of case.

the act authorizing the issuance of the bonds. In the case of City of Geneseo *v.* Geneseo Natural Gas, Coal, Oil, Salt & Mineral Co., 55 Kan. 358, 40 Pac. 655, our supreme court has said: "Chapter 114 of the Laws of 1887, entitled 'An act authorizing counties and incorporated cities of the second and third class to encourage the development of the coal, natural gas and other resources of their localities by subscribing to the stock of companies organized for such purposes,' is unconstitutional and void." Relying upon this authority, the judgment of the district court sustaining the demurrer to the petition of plaintiff below will be affirmed.

NOTE.

Municipal Corporations—Statutes Authorizing Subscriptions to Stock.—Mr. Dillon, in his valuable work, says: "A statute which authorizes the issue of bonds to be paid by taxation to aid certain individuals or classes, or in aid of the *manufacturing enterprise* of individuals or private corporations, is void, this being, within the meaning of the rule, a *private* as distinguished from a *public* purpose, although in a remote or collateral way the local public might be benefited thereby." Citing Ottawa *v.* Carey, 108 U. S. 110, 1 Dill. Mun. Corp. (4th. Ed.) § 508.

STATE (REYNOLDS *et al.*, PROSECUTORS)

v.

TOWN OF WEST HOBOKEN *et al.*

(*Supreme Court of New Jersey, June 20, 1899.*)

Acceptance of Public Work—Certiorari to Set Aside Resolution of Common Council.*—The writ of *certiorari* in this case is prosecuted to set aside a resolution of the common council of West Hoboken accepting the work of the contractor in macadamizing Palisade avenue. The property owners on the avenue have been

*See *note*, generally 1 Mun. Corp. Cas. 305.

*See note at end of case.

assessed for the cost of the work, and have paid their assessments. The allegation of the prosecutors is that the contractor has failed to do the work in accordance with the terms of the contract, and that they are entitled to have the work completed, for which they have been constrained to pay. Assuming all the prosecutors claim to be true, the writ of *certiorari* will not lie. The remedy is in equity.

(Syllabus by the Court.)

CERTIORARI by the state, against the town of West Hoboken and another. *Dismissed.*

Argued February term, 1899, before DEPUE, VAN SYCKEL, and GUMMERE, JJ.

J. B. Vredenburgh, for prosecutors.

Augustus A. Rich, for defendant town of West Hoboken.

Thos. F. Noonan, Jr., for defendant Cannon.

VAN SYCKEL, J. The writ of *certiorari* in this case is prosecuted to set aside a resolution of the common council of the town of West Hoboken accepting the work of the contractor on the improvement known as the "macadamizing of Palisade avenue." The property owners on the avenue have been assessed for the cost of the work, and have paid their assessments. The allegation of the prosecutors is that the contractor has failed to do the work in accordance with the terms of the contract, and that property owners are entitled to have the work completed for which they have been constrained to pay. Assuming all that the prosecutors claim to be true, the writ of *certiorari* will not lie, and it could furnish no adequate remedy to the assessed landowners; for, if the obnoxious resolution were vacated, the council might pay voluntarily. In Bond *v.* City of Newark, 19 N. J. Eq. 376, the bill was filed by Bond and others, property owners on Union street, in Newark, to prevent the city from paying to the defendant O'Connor the full contract price for paving, curbing, guttering, and flagging part of Union street, on the ground that O'Connor had not substantially fulfilled his contract, and that the city authorities were about to pay him the full contract price, in fraud of the property owners, upon whom the cost of the work would fall. CHANCELLOR ZABRIS-

KIE held that the property owners had the right to have the contract made at their expense performed substantially in all things, and that the municipal authorities had no power to dispense with such performance. He declared that willingness on the part of the public corporation to accept and pay for the work which was not performed was a breach of trust on its part, which should be enjoined by a court of equity. In Collingwood *v.* (White N. J. Ch.) 42 Atl. 95, VICE CHANCELLOR PITNEY adopted the view of CHANCELLOR ZABRISKIE, and gave equitable relief to the complainants. The question involved in this case has received the consideration of the court of errors and appeals in the case of Lodor *v.* McGovern, 48 N. J. Eq. 275, 22 Atl. 199, where the rule applicable to it is clearly stated in the opinion of the court, delivered by the late chief justice. The allegation of the bill in that case was that the work was being done by the contractor, both with respect to materials and skill, in violation of his contract, and that the city unjustly, and to the manifest damage of the complainant, acquiesced in such conduct and was ready to pay for the work at the stipulated price. The complainant was the owner of a lot abutting on the street to be improved, and was subject to be assessed for part of the cost of the work. The chief justice said that: "Upon the assumption that this undertaking is being treated in this objectionable manner, it is manifest that the complainant will sustain a wrong, unless he shall have judicial succor for he will ultimately be compelled to pay for defective and inferior work and materials at the same rate as though they were perfect and superior. For such a wrong there must be a legal remedy of some sort, and it is obvious that in a common-law court such redress cannot be obtained. Before such tribunals the complainant could not in any mode present the question whether this work had been properly done or not, for it has been repeatedly decided by the courts of this state that a landowner thus situated cannot raise such an issue after such work has been done, and its cost has been or is being as-

Note

sessed. Necessarily the citizen thus oppressed has the right to appeal to a court of equity for protection, and consequently the legal authority of the complainant to file this bill, by force of the circumstances narrated, must be unquestionable. The principle referred to was declared by CHANCELLOR ZABRISKIE, over twenty years ago, in these words, *viz.*: 'The only remedy in such a case, if the city authorities will not resist the claim, is in equity. If the landowners stand by and see the city pay the contractor, they can have no relief against the assessment. This was so held by the court of errors in a case cited by the counsel of defendant. State *v.* Jersey City, 26 N. J. Law, 444.' Equitable jurisdiction was exercised in similar situations in the cases of Bond *v.* City of Newark, 19 N. J. Eq. 376; Schumm *v.* Seymour, 24 N. J. Eq. 144; and in Liebstein *v.* City of Newark, *Id.* 202." The opinion, however, holds that such bills in equity are pure injunction bills, by which the payment of the contract price to the contractor will be enjoined until the claim of the contractor to the contract price is settled by a jury in a court of law, and such was the purport of the decree advised by VICE CHANCELLOR PITNEY in the case of Collingwood *v.* White, before referred to. The writ of *certiorari* in this case must therefore be dismissed.

NOTE.

Municipal Corporations—Irregularities—Legal and Equitable Jurisdiction—New Jersey Doctrine.—Unless there is ground for the interposition of equity, irregularities in the proceedings of municipal corporations are reviewed in courts of law. Morris Canal, etc., Co. *v.* Jersey City, 12 N. J. Eq. 252; State *v.* Newark, 25 N. J. L. 399; Holmes *v.* Jersey City, 12 N. J. Eq. 299; State *v.* Jersey City, 29 N. J. L. 441; Att'y-Gen. *v.* Paterson, 1 Stock. (N. J.) 624; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Jersey City, 30 N. J. L. 521; Cross *v.* Morristown, 18 N. J. Eq. 305; Bond *v.* Newark, 19 N. J. Eq. 376.

BICKFORD

v.

INHABITANTS OF TOWN OF HYDE PARK.

(*Supreme Judicial Court of Massachusetts, June 30, 1899.*)

Construction of Sewer—Draining Well—Damages.*—Even if there can be no recovery under St. 1896, c. 287, § 4 for injury to petitioner by draining his well through the construction of a sewer, by the town, where there has been no taking of his land, he may recover under section 16 of the act, providing, in substance, that the provisions of chapter fifty of the Public Statutes, so far as applicable and not inconsistent with this act shall apply to the town, there being a provision of such chapter allowing the recovery of any damages sustained through the construction of a sewer by a municipality.

EXCEPTIONS by plaintiff from Norfolk county superior court. *Exceptions sustained.*

J. M. B. Churchill and *E. L. De Normandie*, for petitioner.
J. E. Cotter, for respondent.

LATHROP, J. If we assume in favor of the respondent that the petition cannot be maintained under St. 1896, c. 287, § 4, inasmuch as there was no taking of the petitioner's land, we still are of opinion that the petitioner may recover for the injury done to her estate, under section 16 of the act referred to. This section is as follows: "The provisions of chapter fifty of the Public Statutes and of acts in amendment thereof, so far as applicable and not inconsistent with this act, shall apply to the town of Hyde Park in carrying out the provisions of this act." Section 3, c. 50, Pub. St., is as follows: "Damages occasioned by the laying, making, or maintaining of main drains or common sewers, shall be ascertained and recovered in a city, as in the laying out of highways or streets

*See notes at end of case.

Notes

therein; and in towns, as in the laying out of town ways." To ascertain what damages may be recovered, we must turn to Pub. St. c. 49, § 16, which is as follows: "In estimating the damage sustained by laying out, locating anew, altering, or discontinuing a highway, or by an order for specific repairs, regard shall be had to all the damages done to the party, whether by taking his property or injuring it in any manner; and there shall be allowed, by way of setoff, the benefit, if any, to the property of the party by reason thereof." It is well settled that under this and similar statutes, allowing all the damages done to the party, whether any of his property is taken or not, injury to a landowner by draining his well may be recovered by a petition under the act. Sheldon *v.* Railroad Co., 172 Mass. 180, 51 N. E. 1078, and cases cited. See, also, Penney *v.* Com. (Mass.) 53 N. E. 865. Exceptions sustained.

NOTES.

Construction of Sewer—Draining Well on Land Not Taken—Liability of Municipality.—In Trowbridge *v.* Inhabitants of Brooklyn, 16 Am. & Eng. Corp. Cas. (Mass., 1887), 558, it was held that a town which lawfully takes land and constructs a common sewer therein, whereby a well on land not taken, and not adjoining land taken, is made dry, the well being fed by water percolating through the soil, is liable in damages to the owner of the land in which the well is situated.

Public Improvements—Consequential Damages Where no Part of Premises is Taken.—But in the absence of constitutional or statutory provisions authorizing the recovery of consequential damages for injuries to adjoining property from the proper construction and operation of a public work, such damages are not recoverable, where no part of the premises injured is taken.

United States.—Pumpelly *v.* Green Bay Co., 13 Wall. 166; Transp. Co. *v.* Chicago, 99 U. S. 635.

Colorado.—Colorado Cent. R. Co. *v.* Mollandin, 4 Colo. 154; City of Denver *v.* Bayer, 3 Am. & Eng. Corp. Cas. 465.

Connecticut.—Bradley *v.* Railroad, 21 Conn. 294.

Georgia.—Railroad *v.* Steiner, 44 Ga. 546; Americus *v.* Eldridge,

Notes

64 Ga. 524; Atlanta *v.* Green, 67 Ga. 386; Moore *v.* Atlanta, Vol. 1, No. 10, Denver, L. J. 78.

Illinois.—Nevins *v.* Peoria, 41 Ill. 502; Hyde Park *v.* Dunham, 85 Ill. 569; Gilham *v.* Madison R. R., 49 Ill. 484; Pittsburg, etc., R. Co. *v.* Reich, 101 Ill. 157; Aurora *v.* Gillett, 56 Ill. 519; Aurora *v.* Reed, 57 Ill. 29; Jacksonville *v.* Lambert, 62 Ill. 519; Toledo, etc., R. R. *v.* Morrison, 71 Ill. 616; Pekin *v.* Winkel, 77 Ill. 56; Pekin *v.* Brereton, 77 Ill. 477; Elgin *v.* Eaton, 83 Ill. 535; Shawneetown *v.* Mason, 82 Ill. 337; Stack *v.* East St. Louis, 85 Ill. 377; Chicago & Pac. R. R. *v.* Francis, 70 Ill. 238; McGinnis *v.* Fairbury, P. & N. R. R., 68 Ill. 394; Chicago *v.* Union B'ldg Ass'n, 102 Ill. 379; Chicago *v.* Western Indiana Ry. *v.* Ayers, 14 Am. & Eng. R. Cas. (Ill.) 152.

Indiana.—Snyder *v.* Rockport, 6 Ind. 237.

Iowa.—Barr *v.* City of Oskaloosa, 45 Iowa 275; Clinton *v.* Cedar Rapids, etc., R. Co., 12 Iowa 246; Frith *v.* Dubuque, 45 Iowa 406; Kircheman *v.* Railroad, 46 Iowa 366; Davis *v.* Railroad, 46 Iowa 389.

Kentucky.—Richmond Turnpike Co. *v.* Rogers, 1 Duv. 135.

Louisiana.—Bennett *v.* New Orleans, 14 La. An. 120.

Maine.—Cushman *v.* Smith, 34 Me. 247; Rogers *v.* Kennebec, etc., R. Co., 35 Me. 319; Nichols *v.* Railroad, 43 Me. 356.

Maryland.—Cumberland *v.* Willison, 50 Md. 138.

Massachusetts.—Callender *v.* Marsh, 1 Pick. (Mass.) 418.

Michigan.—Grand Rapids *v.* Jarvis, 30 Mich. 308; Detroit *v.* Beckman, 34 Mich. 125.

Minnesota.—Rochette *v.* Chicago, etc., R. Co., 31 Minn. 201, 17 Am. & Eng. R. Cas. 192.

Missouri.—Lackland *v.* North Missouri R. Co., 34 Mo. 259.

Nebraska.—Gottschalk *v.* Railroad, 14 Neb. 550, 14 Am. & Eng. R. Cas. 157.

New Hampshire.—Eaton *v.* Railroad, 51 N. H. 504; Thompson *v.* Androscoggin Co., 54 N. H. 545.

New Jersey.—Starr *v.* Railroad, 4 Zab. 592; Railroad *v.* Newark, 2 Stock 352; Tinsman *v.* Railroad, 2 Dutch. 148; Trenton Water Works *v.* Raff, 7 Vroom. 336.

New York.—Bellinger *v.* N. Y. Cent. R. R. Co., 23 N. Y. 42; Radcliffe *v.* Brooklyn, 4 N. Y. 195; People *v.* Kerr, 37 Barb. (N. Y.) 414; Story *v.* New York E. L. R. Co., 90 N. Y. 185.

Pennsylvania.—Hornstein *v.* Atlantic, etc., R. Co., 51 Pa. St. 87; Struthers *v.* Dunkirk, etc., R. Co., 87 Pa. St. 282.

Rhode Island.—Rounds *v.* Mumford, 2 R. I. 154.

South Carolina.—McLaughlin *v.* Railroad, 5 Rich. 583.

Texas.—Williams *v.* G. C. & S. F. Ry., Vol. 1, No. 34, Denver L. J. 267; Graves *v.* G. C. & S. Ry., 1 Tex. L. Rev. 8.

Vermont.—Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Livermore *v.* Jamaica, 23 Vt. 361; Hatch *v.* W. Cent. R. R., 25 Vt. 49.

West Virginia.—Johnson *v.* Parkersburg, 16 W. Va. 402.

Wisconsin.—Chapman *v.* Railroad, 33 Wis. 629; Alexander *v.* Milwaukee, 16 Wis. 247.

England.—McCarthy *v.* Metropolitan Board of Works, L. R. & C. P. 508; British Cast Plate Co. *v.* Meredith, 4 D. & E. T. R. 794; East & West India Docks *v.* Gattke, 3 McNaughten & Gordon, 154; Beckett *v.* Midland Ry., L. R. 3 C. P. 82; Rickett *v.* Director of the Metropolitan Ry., L. R. 2 Eng. & Irish App. 175; Caledonian R. R. *v.* Walker's Trustees, L. R. 7 App. Cas. 259; Metropolitan Works *v.* McCarthy, L. R. 7 H. L. 243.

Town of Norman

v.

Ince.

(*Supreme Court of Oklahoma, Aug. 25, 1899.*)

Public Improvements—Injuries to Property—Liability of Municipality.*—A municipal corporation is not impliedly liable for the incidental injuries to property, resulting from the exercise of its legislative powers, by reason of the erection and maintenance of public improvements, where the premises are in no manner invaded; yet such a corporation is responsible for the direct injuries to private property, caused by a corporate act in the nature of a trespass or nuisance.

Same—Same—Same.—A municipal corporation, in the exercise of its corporate powers to construct and maintain public works, has no power to collect water by artificial means, and discharge it, or permit it to discharge or overflow, upon the premises of an adjacent freeholder, so as to interfere with his possession. Hence, for a municipal corporation to collect water by artificial means, such as a water standpipe, and conduct it in such a careless and negligent manner as to allow it to overflow and flood the premises of an adjacent property owner, is such an invasion of private property as to constitute an appropriation of it to public use, and the principle exempting municipal corporations from liability arising from damages

*See notes at end of case.

Town of Norman *v.* Ince

occasioned by the exercise of their discretionary powers in the construction and maintenance of public works does not apply, and the corporation is liable for damages resulting therefrom.

Flooding Adjacent Property—Measure of Damages.—In an action to recover for an injury to property, arising from the carelessness and negligence of the corporate authorities in permitting a water standpipe to continuously overflow upon the premises of an adjacent property owner, the measure of damages is the loss actually sustained, and in case of a permanent injury to the property the true measure of damages is the difference between the value of the property immediately prior to the location and construction of such improvement and its diminished value immediately thereafter.

(Syllabus by the Court.)

ERROR by defendant from Cleveland county probate court. *Affirmed.*

B. F. Wolf and *E. E. Hennessy*, for plaintiff in error.

Williams & Newell, for defendant in error.

HAINER, J. This was an action brought in the probate court of Cleveland county by M. J. Ince, defendant in error, against the town of Norman, plaintiff in error, to recover damages arising by reason of the construction and operation of a water standpipe adjacent to plaintiff's premises. The plaintiff's petition alleged that she is the owner of lots 3 and 4, in block 54, in the town of Norman; that on the 5th day of July, 1894, the defendant corporation erected a water standpipe of the height of 100 feet and of the diameter of 12 feet in close proximity to plaintiff's premises; that said standpipe was so carelessly and negligently constructed by the defendant that from the day of its erection to the time of the bringing of this action it has overflowed and discharged water on the plaintiff's premises; that by reason of said overflow and discharge of said water the plaintiff's premises have become worthless, and as a consequence thereof, the plaintiff has sustained damages in the sum of $150. The demurrer to the petition having been overruled, the defendant answered by pleading a general denial. The case was tried by a jury, and a verdict was returned in favor of the plaintiff, assessing the amount at her

Case Stated.

damages at $50. The defendant moved for judgment on the special findings of fact, for the reason that they were inconsistent with the general verdict, which was overruled by the court, and judgment was thereupon entered in favor of the plaintiff for $50, in accordance with the verdict of the jury. From this judgment the defendant brings the case here on appeal.

The questions raised by the plaintiff in error may be considered under two general assignments of error: (1) That the petition does not state facts sufficient to constitute a cause of action; and (2) that the court committed error in overruling defendant's motion for judgment on the special findings of fact. The plaintiff in error contends that, before the defendant in error can recover damages, it is incumbent upon her to show that the standpipe was so carelessly and negligently constructed that it constituted a nuisance, or that it was so carelessly and negligently constructed that it is unsafe, and renders the occupancy of the premises dangerous. In support of this proposition, counsel for plaintiff in error says: "A municipal corporation, acting under the authority of its charter or general statute, cannot be subjected to a liability for damages arising from the exercise by it of the authority conferred, so long as the authority is properly exercised, and not exceeded, unless the statute or fundamental law expressly gives a right to such damages." 15 Am. & Eng. Enc. Law, p. 1153, and cases cited. We do not think the rule laid down in support of the contention of the plaintiff in error is applicable to the case under consideration. It is true that it is a well-established rule that a municipal corporation is not impliedly liable for the incidental injuries to property, resulting from the exercise of its legislative powers, by reason of the erection and maintenance of public improvements, where the premises are in no manner invaded; yet such a corporation is responsible for the direct injuries to private property caused by a corporate act in the nature of a trespass or nuisance, and therefore a municipal corporation

Public Improvements—Injuries to Property—Liability of Municipality.

has been held liable for an injury to the premises of the plaintiff by flooding it with water, not only where such injury is caused by neglect to keep a sewer in repair, but as well where it is the negligent or necessary result of the constructing of a sewer. 2 Dill. Mun. Corp. § 1045, and numerous authorities cited in notes. In Nevins *v.* City of Peoria, 41 Ill. 502, it is held that a city has no right to take private property without compensation, and no right to use its own property to the injury of another's property, in a manner that would render a private individual responsible in damages, without being responsible itself. And if the public interest requires that the premises of an individual shall be rendered unfit for occupancy, it may be done, but the public should pay for it to the extent that it deprives the owner of its legitimate use. Hence, where a city, in raising the grade of a street, turns a stream of mud and sand upon the premises occupied as a water cure, and an offensive and unwholesome pond is created in the immediate neighborhood, whereby the premises are rendered unhealthy, and unfit for the business for which they had been previously used, an action lies against the city for the injury. In the case of City of Aurora *v.* Reed, 57 Ill. 29, it was held that where a city, through its proper officer, fixes the grade of a street, or the property owners improve the street under the direction of the officer, and the improvement of the street is so made that the water from the rains and melting snow runs to and discharges itself over a lot owned by an individual, the city is liable for damages. The city has no right to turn surface water on private property, nor does it change the principle that the street was improved before the lot was. And it was further held in this case that it is no defense to show that plaintiff might have dug ditches that would have protected his property. He was under no legal obligation to do so and the city was. It was the duty of the city to provide proper sewerage to carry off such water. It is armed with ample power to provide proper means therefor. If necessary, it could condemn ground for the construction of sewers, or use the

streets therefor as far as practicable. In Elliott *v.* Oil City, 129 Pa. St. 570, 18 Atl. 553, it was held that a municipal corporation was liable for damages resulting from the flow of water across the plaintiff's premises through a drain placed across an adjoining street, whereby the flow of water over such premises was largely increased, thus causing the damages. In Field *v.* Inhabitants of West Orange Tp., 36 N. J. Eq. 118, 37 N. J. Eq. 600, where a town, in making street improvements, caused the surface water to be collected, and turned into gutters or drains, and led to a point where the earth was low or marshy, and then discharged it on private property, so that a ditch constructed by the owner of the land adjoining such marsh was rendered inadequate to drain his land, and he was damaged by the accumulation of water thereon, it was held liable for damages as a consequence thereof. In Soule *v.* City of Passaic, 47 N. J. Eq. 28, 20 Atl. 346, it was held that where a municipal corporation deliberately enters upon a scheme of drainage, in pursuance of which it will collect water from a large area, and by artificial means cast it upon private property, through which such lands would not otherwise be drained, it threatens a wrong, which will be restrained by an injunction in a court of equity. In Ashley *v.* City of Port Huron, 35 Mich. 301, COOLEY, C. J., after a review of the authorities on this subject, said: "It is very manifest from this reference to authorities that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury, accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more right to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it, without first acquiring the right of way, it is liable for a tort; but it is no more liable under the circumstances than it is when it pours upon his land a flood of water by a public

sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives, and never could give, authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

Same—Same—Same.

Applying these well-settled principles to the case under consideration, it must follow that a municipal corporation, in the exercise of its corporate powers to construct and maintain public works, has no right to collect water by artificial means, and discharge it, or permit it to discharge or overflow upon the premises of an adjacent freeholder, so as to interfere with his possession. And in this respect a municipal corporation stands upon the same footing as a private individual, and incurs the same liability. Manifestly, for a municipal corporation to collect water by artificial means, such as a water standpipe, and conduct it in such a careless and negligent manner as to allow it to overflow and flood the premises of an adjacent lot owner, is such an invasion of private property as to constitute an appropriation of it to the public use, and the principle exempting municipal corporations from liability arising from damages occasioned by the exercise of their discretionary powers in the construction and maintenance of public works does not apply, and the corporation is liable for damages resulting therefrom. The same rule of law which protects the right of the property of one citizen against the invasion of another citizen must protect it from similar aggressions on the part of municipal corporations. The petition of the plaintiff states a good cause of action, and the demurrer was therefore properly overruled.

It is contended, under the second assignment of error,

that the court erred in overruling defendant's motion for judgment upon the special findings of fact. The findings of fact which are material to this cause are, in substance, as follows: That the plaintiff was the owner of premises described in the petition; that by reason of the erection of the standpipe the lots were rendered worthless; that there was no defect in the construction of the standpipe, so as to render it dangerous, or liable to fall on plaintiff's premises, but that it was conducted carelessly; that since its construction water has escaped and overflowed from said standpipe on and across the plaintiff's premises in sufficient quantity to disturb plaintiff's possession; and that by reason of the construction of the standpipe and the overflowing of water upon the premises of the plaintiff she has sustained damages in the sum of $50. We are clearly of the opinion that the findings of fact are not inconsistent with the general verdict, and fully sustain the views herein expressed. Neither do we think there is any merit in the contention that plaintiff did not occupy the premises alleged to have been injured, and that the rental value of the property is the true measure of damages which may be sustained by the owner of the property. In an action to recover for an injury to property arising from the carelessness and negligence of the corporate authorities in permitting a water standpipe to continuously overflow upon the premises of an adjacent property owner, the measure of damages is the loss actually sustained, and, in case, of a permanent injury to the property, the damages will ordinarily be the difference between the value of the property immediately prior to the location and construction of such improvement and its diminished value immediately thereafter. In Van Pelt *v.* City of Davenport, 42 Iowa, 308, it was held that in an action against a municipal corporation for damages to property, caused by the overflow of water, due to a defective culvert, the measure of damages is the actual injury sustained by the property at the time of its occurrence. In City of Plattsmouth *v.* Boeck, 49 N. W. 167,

Flooding Adjacent Property—Measure of Damages.

the supreme court of Nebraska held that when private property is damaged by the location and construction of a public improvement near it, and the property is not specially benefited by the improvement, the measure of the property owner's damages is the difference between the value of the property immediately before the location and construction of the improvement and its value immediately afterwards. There being no error in the record prejudicial to the substantial rights of the plaintiff in error (defendant in the court below), the judgment of the probate court is therefore affirmed. All the justices concurring.

NOTES.

Liability of Municipality for Maintaining Nuisance.—See City of New Albany *v.* Slider, 1 Mun. Corp. Cas. 157, and *notes*, 162 *et seq.*

Liability of Municipality for Injury Caused by Defective Drains and Sewers.—See Burnett *v.* Mayor, etc., of City of New York, 1 Mun. Corp. Cas. 75, and extensive *note*, 77 *et seq.*

Drainage of Surface Water—Liability of Municipality for Injury to Land.—See Town of Thorntown *v.* Fugate *et al.*, 1 Mun. Corp. Cas. 62, and *note*, 66 *et seq.*

Change of Street Grade—Liability for Consequential Damages.—See Ehrsam *v.* City of Utica, 1 Mun. Corp. Cas. 70, and *notes*, 73 *et seq.*

HARRIS

v.

CITY OF FOND DU LAC.

(*Supreme Court of Wisconsin, Sept. 26, 1899.*)

Defective Streets—Notice of Personal Injuries—Charters—Statutes—Amendments.—Where a statute, providing as to the notice to be given as a condition precedent to a right of action for personal injuries caused by a defective highway, does not apply to municipalities whose charters contain special provisions on the subject, an amendment of such statute, also, does not apply to such municipalities, unless a different intention is plainly manifested therein,

Harris *v.* City of Fond du Lac

and a mere change in the time limit for notice does not show such intention.

Same—Same—Upon Whom Served.*—Where a municipal charter requires service of notice of personal injuries, caused by a defective street or sidewalk, upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward where the injury occurred, as a condition precedent to a right of action against the city, notice served upon the city clerk, and upon the mayor, personally, is fatally defective.

APPEAL by defendant from Fond du Lac county circuit court. *Reversed.*

The complaint set forth that on August 25, 1897, plaintiff was injured by reason of a defective street in said city; that, by reason of such injuries, he was rendered insensible for a long time, and during the resulting illness suffered such severe pains as to render him physically and mentally unable to attend to business or to correspond with his attorney; that, as soon as he was able, and on the 16th of September, 1897, he caused written notice to be given said city, by serving the same upon B., city clerk of said city, and upon E., mayor of said city, personally. The demurrer was upon the ground that the complaint stated no cause of action, for that it showed no service of notice upon the city within the time required by law.

Case Stated.

O. H. Ecke, *E. W. Phelps*, and *Maurice McKenna*, for appellant.

Cooper, *Simmons & Nelson*, for respondent.

DODGE, J. (after stating the facts). The charter of Fond du Lac, as amended (section 4, c. 435, Laws 1889), declared that no suit should be maintained unless a notice was served, within 30 days after the injury, upon the street commissioner or sidewalk superintendent of the city, or an alderman of the ward where the injury occurred, and provided: "But when the person so injured shall in consequence thereof be bereft of reason, the notice shall not be required

*See Seamons *et ux. v.* Fitts, Town Treas., (R. I.), 1 Mun. Corp. Cas. 465, and *notes*.

until thirty days after he has been fully restored to consciousness." By chapter 236, Laws 1897, section 1339, Rev. St. 1878, is amended so as to provide that no action for injuries from defective highways shall be maintained unless notice is given within 30 days, in case of any county or town, and 15 days, in case of any city or village, to the county clerk of the county, supervisor of the town, one of the trustees of the village, or the mayor or city clerk of the city.

The question debated by counsel, and which we therefore take up for consideration, was whether the amendment of section 1339, made in 1897, applied to and controlled in the city of Fond du Lac, or whether the charter of that city was still in force upon the subject of notice. The somewhat extended argument of counsel for respondent, that the notice clause, especially that in case of one bereft of reason, in the city charter, should not be repealed by implication unless the general act is clearly repugnant, needs but little consideration. Repugnancy is too plain for discussion between a provision that a notice must be given in all cases within 15 days, and one declaring that in some cases it need not be given until 30. The question is at once broader and more simple. Was it intended by the legislature, in the enactment of chapter 236, Laws 1897, to thereby extend the provisions of section 1339 over all cities, or to except therefrom cities having special charter provisions on the general subject covered by it and inconsistent with it? Section 4986, Rev. St. 1878, provided that the laws contained in the Revised Statutes shall apply to, and be in force in, every city and village, so far as the same are not inconsistent with the charter of any such city or village. When the provisions of any such charter are at variance with the provisions of the Revised Statutes, the provisions of such charter shall prevail, unless a different intention be plainly manifested. It is thus apparent that section 1339, as it existed before the amendment in 1897,

Defective Streets—Notice of Personal Injuries—Charters—Statutes—Amendments.

was not applicable, at least upon the subject of notice, to the city of Fond du Lac; and its amendment, by changing the time limit for notice, can no more be obnoxious to constitutional objection, by reason of the constitutional amendment of 1892, than could the legislation considered in State *v.* Howe, 95 Wis. 530, 70 N. W. 670, because limited to the same class of cities as the original section. This act was by its express terms an amendment of section 1339, substituting 15 for the 90 days originally therein limited. That section, by virtue of section 4986, was confined to certain cities, *viz.* those not having special and inconsistent charter provisions, and did not apply to Fond du Lac. Walworth Co. Sup'rs *v.* Village of Whitewater, 17 Wis. 193. It is hardly conceivable that the legislature, by amending such section, in a single detail intended to legislate with reference to a city not affected thereby. We think it obvious that the legislative purpose went no further than amendment, and that section 1339 applied to no more cities afterwards than before. As a result, the giving of notice at the time of the injury complained of was regulated by the charter, and not by the Revised Statutes. Thompson *v.* City of Milwaukee, 69 Wis. 492, 34 N. W. 402; Baines *v.* City of Janesville, 100 Wis. 369, 75 N. W. 404. The statement in Daniels *v.* City of Racine, 98 Wis. 649, 74 N. W. 553, to the effect that the amendment to the statute in question applied to all cities and villages, was, of course, made with reference to the case there presented,—that of a city having no special charter provision on the subject of notice, and therefore within the class regulated by the section amended. So understood, it in no wise conflicts with the construction now adopted.

Same—Same—Upon Whom Served.

Although, as a result of the conclusion reached above, the attempted service was within the time limited by law, the complaint fails to allege service in the manner provided. The charter requires service upon the street commissioner or sidewalk superintendent of the city or an alderman of the ward where the injury occurred. The complaint alleges no service on either

of these officers, but, instead, upon the mayor and city clerk. This is necessarily fatal. Notice as required by the statute applicable is a condition precedent to suit, and an essential allegation of the complaint. Order appealed from is reversed, and cause remanded, with directions to sustain the demurrer.

MISSANO *et al.*

v.

MAYOR, ETC., OF CITY OF NEW YORK.

(*Court of Appeals of New York, Oct. 3, 1899.*)

Personal Injuries—Notice of Intent to Sue Municipality.—A notice of intention to sue New York City for personal injuries may be a substantial compliance with the provisions of chapter 572 of the Laws of 1866 of New York, and valid, although it appears upon its face to a compliance with section 1104 of the consolidation act of the city.

Same—Negligence of Street-Cleaning Department—Liability of City.*—A municipal corporation cannot escape liability for a wrongful death caused by the negligence of its street-cleaning department, merely because the discharge of the duties of the department incidently benefit the public health.

APPEAL by plaintiffs from appellate division First department supreme court. *Reversed.*

Abram Kling and *M. P. O'Connor*, for appellants.

Theodore Connoly, for respondent.

BARTLETT, J. This action was brought to recover damages for the death of a child, who was run over and killed by a horse attached to an ash cart of the street-cleaning department of the defendant. Two questions were argued before us on this appeal,—the first, whether plaintiffs complied with the provisions of chapter 572 of the Laws of 1886,

*See Quill *v.* Mayor, etc., of City of New York (N. Y.), 1 Mun. Corp. Cas. 35, and *note*, p. 41.

requiring a filing with the corporation counsel of a notice of intention to commence the action; the second, whether the city of New York is liable for the alleged negligent act of an employee of the department of street cleaning.

Personal Injuries —Notice of Intent to Sue Municipality.

The first question only was considered by the learned appellate division. That court held the requisite notice was not served, and dismissed the complaint. We agree with the opinion of JUDGE GRAY as to the first question, wherein he holds that the notice given by plaintiffs of their intention to commence this action was a substantial compliance with the statute. We also agree with JUDGE GRAY that the case on the merits was properly submitted to the jury, but are unable to adopt his conclusion that the judgment should be affirmed on the ground that the city of New York is not liable for the negligent acts of the employees in its department of street cleaning. The weight of authority in this state establishes, we think, the liability of the defendant. This subject has been discussed at length by learned judges and text writers, so that a brief reference to the principles and authorities involved is all that is necessary at this time.

Same—Negligence of Street-Cleaning Department—Liability of City.

JUDGE DILLON points out, in his work on Municipal Corporations (4th Ed.), that such corporations are possessed of dual powers,—the one governmental, legislative, or public, and the other proprietary or private (section 66); that the care of the streets is within the latter classification (section 980). In Conrad *v.* Trustees, 16 N. Y. 158, it was held that, where the trustees of the village were made by its charter commissioners of highways, they were to be regarded, in respect to that function, not as independent public officers, but as the agents of the corporation, so as to make the latter civilly responsible for their acts of omission, according to the law of master and servant. In a note to the case last cited is published an opinion by JUDGE SELDEN in Weet *v.* Trustees, wherein he points out the principle that lies at the basis of the rule which makes a municipal corporation liable

under the maxim of *respondeat superior*, as follows: "That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to inure to the benefit of every individual interested in its performance." This liability of the municipality as to the care of the streets was again recognized by this court in Ehrgott *v.* Mayor, etc., 96 N. Y. 264. JUDGE EARL, after citing Conrad *v.* Trustees, 16 N. Y. 158; Requa *v.* City of Rochester, 45 N. Y. 129; Hutson *v.* Mayor, etc., 9 N. Y. 163; Davenport *v.* Ruckman, 37 N. Y. 568; Hume *v.* Mayor, etc., 74 N. Y. 264,—observed that the rule has been somewhat criticised, but that "it has the sanction of a wise public policy, the support of good reasons, and that its operation is generally just and beneficent." This principle has been recognized in many other cases in this state that need not be cited. It has also been approved by the supreme court of the United States in Barnes *v.* District of Columbia, 91 U. S. 540, and by the circuit court of the United States in Barney Dumping-Boat Co. *v.* Mayor, etc., of City of New York, 40 Fed. 50. In the latter case, JUDGE WALLACE, referring to the commissioner of street cleaning, aptly says: "His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them." The case of Maxmilian *v.* Mayor, etc., 62 N. Y. 160, is cited as an authority for the defendant. It is a leading case defining the limits of municipal power, public and private, and is in accord with the authorities we

have cited. The question there presented was whether the commissioners of public charities and corrections performed their duties for the especial benefit of the city of New York in its proprietary or private interests, or whether they exercised a public function, as an organ of the sovereign power, "in the due discharge of the duty of the state in that locality to the poor, the crazed, the wicked." It was held that the commissioners were clothed with public powers, being called upon to maintain a vast system of charity and penal administration representing the sovereignty of the state. JUDGE FOLGER in his opinion pointed out that the cases cited by plaintiff were to be distinguished, as they rested upon principles in harmony with those announced by the court. He referred particularly to Conrad *v.* Trustees, 16 N. Y. 158, as an illustration of the duty of a municipal corporation to care for its streets when acting as any other private owner of property. There are many duties imposed upon a municipality that may be discharged by a commissioner or superintendent who hires and discharges subagents and servants, but this in no way relieves it from responsibility for the negligent acts of those so employed. At the time this alleged cause of action accrued it was the duty of the city of New York to keep its streets in repair, and to see that they were thoroughly cleaned and kept clean at all times; also to remove the sweepings, ashes, and garbage as often as the public health and use of the streets required it to be done. Consolidation Act, § 704, as amended by Laws 1892, c. 269. The fact that the discharge of this duty might incidentally benefit the public health did not make the acts of the commissioner of street cleaning a public function. It is clear, upon principle and authority, that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign. Max-

milian *v.* Mayor, etc., 62 N. Y. 164. The judgment and order appealed from should be reversed, and the judgment of the trial term affirmed, with costs in all the courts.

GRAY, J. (dissenting in part). This action was brought to recover damages for the death of a child, which the plaintiffs allege to have been caused through the negligence of the defendant. They allege that the defendant was the owner of certain horses and carts, which were used for the purpose of gathering ashes, garbage, and refuse from its streets, and that, upon the occasion in question, one of the carts was being drawn so negligently as to run over the child, and to cause injuries which resulted in her death. The complaint also alleges that, prior to the commencement of the action, a notice of intention to bring the same, embodying the requirements of chapter 572 of the Laws of 1886, was duly filed with the proper officer of the defendant. The answer denied the filing by the plaintiffs of the notice, and put in issue the other allegations, which charged the defendant with negligence. When the cause came on for trial, motions were made to dismiss the complaint upon two specific grounds. It having been admitted that the cart, by which the injury was caused, belonged to the street-cleaning department of the defendant, the defendant's counsel moved to dismiss the complaint upon the ground that there was no cause of action against the defendant. This motion was denied, and the defendant excepted. The point was then made that the plaintiffs had failed to comply with the requirements of the act of 1886, with respect to the filing of a notice of the intention to sue with the counsel to the corporation. The paper being produced by the defendant, which the plaintiffs had caused to be filed prior to the commencement of the action, it appeared therefrom that it was addressed to the comptroller of the city of New York, and read that, "incompliance with section 1104 of the consolidation act of New York City, we serve you with notice of our intention to bring an action for damages for five thousand dollars against the mayor, aldermen, and

commonalty of the city of New York," and it proceeded, further, to give the date and facts of the occurrence which resulted in the death of the plaintiffs' intestate. It was admitted by the defendant that the notice, after being received by the comptroller, was sent by him to the corporation counsel, and was filed by the latter in his office. It was also admitted by the defendant that, subsequently to the receipt by the corporation counsel of the notice, "the defendant duly gave notice to the plaintiffs to appear and submit to an examination as to the claim, of which they gave the city notice of their intention, and in pursuance of that the plaintiffs did appear before the counsel to the corporation, and did submit to an examination by the said counsel to the corporation." In fact, this notice to the plaintiffs to appear was given by the comptroller. Upon these facts, the trial court ruled that the notice of the plaintiffs was filed with the corporation counsel, as required by the act of 1886, and the defendant excepted to the ruling. The trial resulted in a verdict for the plaintiffs; but, upon appeal to the appellate division in the First department, the judgment, which had been entered upon the verdict was reversed, and the complaint was dismissed. From the order of reversal and the judgment entered thereon the plaintiffs appeal to this court.

So far as the merits are concerned, the facts brought out upon the trial were such as to make the case one for the decision of a jury; but the exceptions to the refusal of the trial court to dismiss the complaint, which I have referred to, present two serious questions of law, and, if the defendant's contention as to either is correct, the determination of the appellate division was justified. By reference to the opinion of the appellate division, it will be seen that a majority of the learned justices of that court considered that there had been such a failure on the part of the plaintiffs to comply with the provisions of the act of 1886, which require the filing with the corporation counsel of a notice of an intention to commence the action, as to deprive the plaintiffs of the right to maintain it. It was conceded in the opinion

that the notice was sufficient in all respects, except that it should have been filed with the corporation counsel by the plaintiffs themselves, or in their behalf by their duly-authorized agent, and the view was taken that the rule of the statute with respect to filing must be strictly complied with.

This question of the sufficiency of the notice given by the plaintiffs under the statute is, more properly, to be considered in first order. Chapter 572 of the Laws of 1886, in the first section, provides that "no action against the mayor, aldermen and commonalty of any city * * * for damages for personal injuries alleged to have been sustained by reason of the negligence of such mayor," etc., "* * * shall be maintained * * * unless notice of the intention to commence such action and of the time and place at which the injuries were received shall have been filed with the counsel to the corporation or other proper law officer thereof within six months after such cause of action shall have accrued." The notice which the plaintiffs gave was defective in these respects, *viz.* that it was addressed to, and was filed with, the comptroller of the city, and that it purported to be given in compliance with section 1104 of the consolidation act. In all other respects the notice did comply with the requirements of the act of 1886. I do not consider that the fact that the notice purported to be given in compliance with section 1104 of the consolidation act is of serious importance. It was a mistake, of course, inasmuch as the section of the consolidation act referred to has no reference to the service of a notice of an intention to sue; but there was no room for mistake as to the purpose and object of the notice on the part of the municipal officer who received it. The important and serious question, therefore, is whether there was a substantial compliance by the plaintiffs with the provisions of the act of 1886. In that enactment the legislature attached a condition to the right to sue certain cities in tort, compliance with which was necessary in order to the successful maintenance of the action. The object was that the counsel, or law officer, of the corporation should be seasonably informed of the

claim which was to be sued upon, in order that it might be immediately investigated and properly defended. While the direction of the statute is one which must be strictly followed, I do not perceive any good reason for holding that the failure of the plaintiffs to file the notice with the counsel to the corporation is fatal to the maintenance of their action, if, in fact, the corporation counsel received and filed the notice. Especially should this be so when, as here, he acted upon it by examining the plaintiffs upon the notice to them to appear. The filing of the notice was required by the statute in the interest and for the benefit of the defendant, and, while made a condition of the right to maintain the action, the intent was to furnish to the corporation a defense by way of bar to the action when not complied with. The provision affected, not the cause of action, but the remedy, by regulating the procedure. The statute neither prescribes a form of notice, nor by whom the notice shall be filed; and, while its proper construction might require that the notice be given by the party proposing to commence the action, its provisions are not so rigid as to invalidate the notice, if actually and seasonably received by the corporation counsel, because received by him from another official, with whom it was mistakenly filed by the parties. I can see no analogy here with the case of Gates *v.* State, 128 N. Y. 221, 28 N. E. 373, where we held that the jurisdiction of the board of canal appraisers to act upon a claim against the state depended upon the actual receipt and filing of the claim. In that case the claim was sent by mail, and we held that it would be quite inconsistent with the principle upon which that tribunal assumes jurisdiction that that jurisdiction should rest upon a presumption of the receipt of the claim, because sent through the mail. Where jurisdiction to act as a tribunal upon claims against the state, as in that case, is limited and special, it must be based upon undisputable facts, and not upon presumptions. It is my opinion, therefore, that there was a substantial compliance with the act of 1886, and that the purpose of the act was accomplished, when the law officer of the defendant received

and filed the notice of these plaintiffs of their intention to commence an action upon the facts stated therein.

The more serious objection, and the one which, to my mind, is fatal to the plaintiffs' cause of action, is that which goes to the right of the plaintiffs to hold the defendant responsible for the act of the driver of the ash cart. It was conceded that he was an employee of the street-cleaning department of the defendant, and the question is whether the rule *respondeat superior* may apply. That it can be applied to the case of a municipal corporation is doubtless true; but its applicability may depend upon the character of the duty performed by the officer or the subordinate whose act was the immediate cause of the injury for which the complainant seeks redress. By the New York City consolidation act (chapter 410, Laws 1882 as amended by chapter 269, Laws 1892), certain municipal departments were created, among which was that of the department of street cleaning. Section 34. It was provided that "the head of the department of street cleaning shall be called the commissioner of street cleaning, and shall, unless sooner removed, hold his office for six years," etc., and his appointment is to be made by the mayor. Section 45. Section 704 provided that "the department of street cleaning shall have exclusive charge of the sweeping and cleaning of the streets, and the removal of ashes and garbage in the city," and it further empowered and authorized the commissioner of street cleaning, and made it his duty, to remove from said city, or otherwise dispose of, "as often as the public health and the use of the streets may require, all street sweepings, ashes and garbage," etc. By other provisions, the appointment of the members of the department is vested in the commissioner, with certain powers as to their removal; differing, as they may belong to the clerical force, or to the "uniformed force" of laborers. The driver of the ash cart, in this case, as one of the employees of the department, was therefore under the immediate control of the commissioner. If the commissioner was engaged in performing a duty laid by the law upon him, and not upon the municipality, within the

principle of the decision in Maxmilian *v.* Mayor, etc., 62 N. Y. 160, the defendant is not liable for his negligence or that of his employee. In that case the injury occurred as the result of the act of the driver of an ambulance, who was in the employ of the commissioner of public charities. It was held that the principle of responsibility for the negligent acts of a subordinate or servant could not apply to the defendant corporation, where the act complained of was committed by one in the employ of a department created by the law for the purpose, not of especially benefiting the defendant, but the public or the members of the community. As the driver of the ambulance was the servant or employee of the commissioners of the department of charities and corrections, who had the right to select or to remove him, and to control his acts, they alone could be considered as his superiors, within the rule of law. The test is whether, in the particular case, the power and duty are conferred and accepted for the corporate benefit and performed by agents appointed by the corporation and under its control, in which case corporate liability for the acts of its agents attaches; or whether the power and duty are conferred upon public officers, for the public benefit, and as a convenient way of exercising a governmental function, over whose subordinates or servants the corporation has no control. The doctrine of the Maxmilian Case was followed in the case of Ham *v.* Mayor, etc., 70 N. Y. 459, where the question was as to the liability of the defendant for the acts of the subordinates and servants of the commissioners of the board of education. The department of public instruction, in that case, was held to be a governmental agency, and, as the commissioners, though appointed by the mayor, were not amenable to the corporation in any respect, there could be no liability upon the part of the city for the acts of their employees. The discussion was very full in the Maxmilian Case, and the decision has always been regarded as authoritative. Unless we can distinguish the present case, and are able to say of this department that its powers were conferred for the benefit of the corporation, as

a corporate body, and that its duties are performed by agents appointed by the corporation and under its control and power of removal, I think we must follow the authority of the Maxmilian Case. Duties imposed upon municipalities for the benefit of all citizens, in the exercise of the sovereign power, and which are to be performed by independent officers, who may take their appointment from the corporation itself, through the nomination of its executive agents, make of the officers servants of the public at large. They are not then the agents or servants of the municipal corporation, but they are public officers, agents, or servants of the general public, and the corporation is not responsible for their acts or omissions, or for those of their subordinates. In appointing the officer, in obedience to an act of the legislature, it does so in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community. This very explicit doctrine rests upon the basis of the distinction between the exercise by a municipality of powers which are delegated to it by the general government to be exercised for the public welfare and those which are conferred upon it for some especial benefit and advantage in its corporate capacity.

What section 704 of the consolidation act required was that the corporation, through a department created for the purpose, should remove from its streets sweepings, ashes, and garbage, and that it should keep the streets clean, as a measure of public health. It is not necessarily a corporate duty of the municipality to remove ashes and garbage, but that that should be done is important to the members of the community. for the protection of their health; and, that the performance of a work so necessary to the public well-being shall not rest in the individual effort of the citizen, the legislative body, acting for the public at large, insures performance by the creation of a particular municipal department, empowered and authorized sufficiently for the purpose. The duty resting upon the department in that respect concerned the general public, as a health measure of far-reaching consequences. The situation is that the legislature of the state created the

municipal department, and placed at its head an officer, whose term of office was fixed, who was made independent, and who was to appoint, remove, and control all the members of the force needed for the department work, and it imposed upon him the duty, "as often as the public health may require," of removing street sweepings, ashes, and garbage. That he and his subordinates are the servants of the defendant, for the consequences of whose negligent or culpable acts it is responsible, I very much doubt. In New York & B. Sawmill & Lumber Co. *v.* City of Brooklyn, 71 N. Y. 580, it was said by CHURCH, C. J.: "We have recently held that a municipal corporation is not liable for the omission to perform, or for negligence in the performance of, a public duty laid upon an independent officer, in which it has no private interest, and from the performance of which it derives no special or corporate benefit, although it is required to elect or appoint such officer, and although the officer has in charge, and the negligence imputed is the use of, property owned by the corporation [citing Maxmilian *v.* Mayor, etc.]. * * * The general rule may be stated to be that a municipal corporation is only liable for the acts or omissions of officers in the performance of duties imposed upon the principal."

In creating this department of the New York City government, the legislature delegated to it, as a political agency, a duty which related to the protection of the public health. This duty, as one of the highest which pertain to government, for its full and efficient performance manifestly required such legislation as would tend to insure the removal and the prevention of conditions favorable to the development or the spreading of disease. Therefore the head of the department had his direct grant of power and his direct imposition of duty from the statute. The defendant may not control him, save in strict accordance with the provisions of law, and it may neither select nor control nor remove his agents or subordinates. How can the rule *respondeat superior* apply? as it was asked in the Maxmilian Case. Where a duty rests upon the municipality, in the performance of which it is

interested, either because of advantage in revenue or emoluments, or because it pertains to it in its private corporate capacity, then it will be held to a strict liability for the consequences of a careless performance, or of a nonperformance, of some duty, through which injury or damage has occurred. Such a duty belongs to the municipality as to keep its streets, bridges, and other ways of passage in repair, and the reference of appellants' counsel is to that class of cases. They are, however, corporate acts, expressly or impliedly agreed to be performed through the acceptance of the grant of a charter. The duty is one with which the city is charged for its own corporate benefit, which is to be performed by its own agents, and for the performance of which it is responsible upon settled principles. Cases in other jurisdictions might be referred to which hold that, where a municipal corporation is engaged in the governmental duty of promoting the general health, it will not become liable for the negligence of those employed in the performance of that duty. Condict *v.* Mayor, etc., 46 N. J. Law, 157; Conelly *v.* City of Nashville, 100 Tenn. 262, 46 S. W. 565. In the Condict Case the negligent act was committed by the driver of a dump cart, while in the Conelly Case it was committed by the driver of a sprinkling cart.

My conclusion is that the defendant was not responsible for the tortious act of the driver of this ash cart. His superior was the commissioner of the street-cleaning department, and that officer was engaged in discharging a duty laid upon him as an independent officer, for the purpose of doing something which would tend to insure the health and comfort of the public at large. For these reasons I think that the judgment and order appealed from should be affirmed, and that judgment absolute should be ordered for the defendant, with costs.

HAIGHT, MARTIN, and VANN, JJ., concur with BARTLETT, J., for reversal, etc.; O'BRIEN, J., concurs with GRAY, J., for affirmance; PARKER, C. J., not sitting.

Judgment and order reversed, etc.

CITY OF ROANOKE

v.

SHULL.

(*Supreme Court of Appeals of Virginia, Sept. 14, 1899.*)

Defective Sidewalks—Injuries to Children—Contributory Negligence—Question for Jury.*—In an action for personal injuries to plaintiff, a girl between 11 and 12 years old, alleged to have resulted from defendant's negligence in permitting a hole to remain in a sidewalk, it was proper to refuse to allow defendant's witness to testify as to whether a person exercising ordinary care could have seen the hole in the sidewalk, and avoided stepping into it; as the question of ordinary care was for the jury to pass upon, under all the circumstances of the case, plaintiff's age being one of the facts to be considered.

Same—Same—Liability of City—Evidence.—In such action, testimony as to the number of miles of streets in the defendant city was irrelevant; as the city's liability for injuries caused by its negligence in not keeping its streets and walkways in a reasonably safe condition could not be affected by the fact that it had laid out more public ways than it could keep in such condition.

Same—Duty to Keep in Repair—Instructions.†—In such action, an instruction that it was the duty of the city to keep its public ways in repair, did not injure plaintiff, in stating that it owed such duty to "all persons" using such ways.

Injuries to Children—Contributory Negligence—Presumptions.—The law presumes that a person between the age of 7 and 14 years cannot be guilty of contributory negligence; and, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances.

Same—Imputable Negligence.‡—In an action by an infant for personal injuries caused by a defect in a sidewalk, the negligence of plaintiff's parents in allowing her to go upon the streets unattended cannot be imputed to plaintiff.

Excessive Verdict.—In such action, it appeared that the breaking of plaintiff's leg had shortened the limb an inch and a quarter or

*See *note*, 1 Mun. Corp. Cas. 490.

†See generally *note*, 1 Mun. Corp. Cas. 58.

‡See note at end of case.

City of Roanoke *v.* Shull

more, and caused a wasting away of the limb; that her lower limbs were totally paralyzed for several weeks; that her legs and lower organs, when the trial was had, were partially paralyzed; that her prospects of recovery from such paralysis were not very bright: and that such injuries were caused by defendant's negligence, without contributory negligence on the part of plaintiff. *Held*, that a verdict for $5,000 would not be set aside as excessive compensation for such injuries, nor for insufficiency of evidence.

ERROR by defendant to city of Roanoke circuit court. *Affirmed.*

Moomaw & Woods, for plaintiff in error.
Cocke & Glasgow, for defendant in error.

CARDWELL, J. Olive Virginia Shull, an infant between the age of 11 and 12 years, by her next friend, instituted this action in the circuit court of the city of Roanoke to recover damages for injuries alleged to have been sustained by her in consequence of the negligence of the city of Roanoke, plaintiff in error, in not keeping its streets, footways, etc., in a reasonably safe condition.

Case Stated.

After setting out the duties of the defendant, under its charter and the general laws of the state, to keep sound, safe, and serviceable, for public use and travel, all its pavements, footways, streets, bridges, and sidewalks, and particularly the sidewalk or footway on the western side of the bridge across Roanoke river, near the intersection of Virginia avenue and the Riverside boulevard, in said city, in which highway, bridge, footway, and sidewalk there was, for a long time before, and on the day and year of the alleged injury, a certain hole or opening, by a plank or board (out of which the footway, sidewalk, and bridge is constructed) removed and missing, of all which the defendant long before had notice, the declaration alleges that the defendant, well knowing the premises, although bound as aforesaid to keep said highway in good condition and repair for the use of the public and the plaintiff, disregarded its duty in the premises, and did not keep the same in good repair, but willfully, wrongfully, etc., permitted said hole to be and continue, and

the same was then and there, so badly, insufficiently, and defectively covered or protected that, by means of the premises and for the want of proper covering and protection to said hole or area, the plaintiff, who was passing in and along said highway, bridge, footway, street, or sidewalk, then and there necessarily and unavoidably fell into and through said hole a great distance, to wit, 35 feet, to the ground below, and thereby her right leg was broken, fractured, and lacerated in two places, and was further injured in her back, spine, shoulders, intestines, and other organs, and became sick, sore, lame, etc., and by means of the premises the plaintiff was so maimed as to be disabled for life.

A demurrer to the declaration was overruled, and issue joined on the plea of not guilty, which was tried, and a verdict rendered in favor of the plaintiff, assessing her damages at $5,000, and, a judgment having been rendered on the verdict, the case, on a writ of error, was brought to this court.

The demurrer to the declaration was waived in the oral argument here, and we will consider the rulings of the court below at the trial to which exception was taken by the defendant, and relied on here, in their order.

The first is to the refusal of the court to allow defendant's witness Dyer to answer the question: "Could not a person exercising ordinary care have seen the hole in the sidewalk, and avoided stepping into it?" counsel for defendant stating that it was intended by the question to show by the witness, who had seen the place in the sidewalk complained of, the character and danger of the defect therein. We are of opinion that the court did not err in refusing to allow the question to be answered. The question of what is "ordinary care" was one for the jury to pass upon, under all the circumstances of the case, the age of the plaintiff being one of the facts to be considered. Expert testimony, which the question was intended to elicit, was not admissible, and would have been a usurpation of the functions of the jury.

Defective Sidewalks—Injuries to Children—Contributory Negligence—Question for Jury.

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Witness J. H. Wingate, the city engineer for the city of Roanoke, was asked by defendant's counsel, "How many miles of streets has the city?" to which objection was made, and the objection sustained, and this action of the court constitutes defendant's second bill of exceptions. The object of this question, counsel for defendant stated, was to show to the jury all the circumstances that existed when they came to consider what was a reasonable time to impute notice of the defect complained of to the city of Roanoke, and also what would be a reasonable time, under all the circumstances, for the city to repair the said defect after it had notice thereof, actual or imputed. It is difficult to perceive how any answer to this question could have affected the responsibility of the city for the injury complained of. The measure of the city's liability is fixed by law. Its liability for injuries caused by its negligence in not keeping its streets and walkways in a reasonably safe condition for use of the public extends to the limits of the territory embraced in the charter of the city, and it cannot evade its liability because it has laid out more streets, sidewalks, and footways for the use of the public than it could keep in a reasonably safe condition. As counsel for defendant in error well observes, the law requires that a municipality shall keep its streets, etc., in a certain state of repair. If it fails so to do, and an accident happens by reason of its failure to perform its duty, then it is liable for the injury so caused. It will not be permitted to say that it had so much to do that it could not perform its whole duty. It was not error to refuse to permit the witness Wingate to answer the question, as any answer thereto would have been irrelevant.

Same—Same—Liability of City—Evidence.

Of the five instructions given to the jury at the instance of the plaintiff, the defendant insists here only upon its exceptions to the first and second. The instructions are as follows:

(1) "The court instructs the jury that the defendant is bound to use reasonable care and precaution to keep and

maintain its streets, bridges, and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same; and if the jury believe from the evidence that the defendant, the city of Roanoke, failed to use all reasonable care and precaution to keep its bridges and sidewalks in such repair, and that the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby while exercising such a degree of care and caution as, under the circumstances, might reasonably be expected from one of her age and intelligence, then she is entitled to recover of the defendant in this suit."

(2) "The court further instructs the jury that the conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; that while it is the general rule, in regard to an adult or grown person, that, to entitle him or her to recover damages for an injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to its maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury, and the law presumes that a child between the ages of 7 and 14 years cannot be guilty of contributory negligence, and, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity."

The main objection urged to the first instruction is to the use of the words "all persons," where it told the jury what was the duty of the city in keeping its streets, bridges, and sidewalks in order. It is contended that the instruction, especially in the use of the words "all persons," misled, or may have misled, the jury to an erroneous conclusion with reference to the duty of the city in keeping its streets, etc., in order. Had these words been omitted from the instruction, or the

Same—Duty to Keep in Repair—Instructions.

words "the public" used in lieu thereof, the meaning of the instruction would have been the same. That the city was bound to keep its streets, bridges, and walkways in a reasonably safe condition for the use of the public is not, nor can it be, controverted. The instruction was entirely applicable to the case, and told the jury, in effect, that if the city failed to use reasonable care in keeping its bridge and sidewalk, over which the plaintiff was passing when injured, in repair, and the accident resulted from that cause, and the plaintiff sustained damage therefrom while exercising such degree of care and caution as, under the circumstances, might reasonably be expected from one of her age and intelligence, then she was entitled to recover in this action. This is the law, for which no citation of authority is needed.

The only objection urged to plaintiff's second instruction is with reference to that portion of it which tells the jury that the law presumes that a person between the age of 7 and 14 years cannot be guilty of contributory negligence, and that, in order to establish that a child of such age is capable of contributory negligence, such presumption must be rebutted by evidence and circumstances establishing her maturity and capacity.

Injuries to Children—Contributory Negligence—Presumptions.

This instruction propounded the law as laid down by this court in the case of Trumbo's Adm'r *v.* Street-Car Co., 89 Va. 782, 17 S. E. 124, citing numerous authorities to sustain it. See, also, Railroad Co. *v.* Groseclose's Adm'r, 88 Va. 267, 13 S. E. 454; Railway Co. *v.* Quayle, 95 Va. 741, 30 S. E. 391.

We are of opinion, therefore, that the court below did not err in giving either of the plaintiff's instructions complained of.

The next assignment of error is to the refusal of the court to give defendant's instruction No. 3, which is as follows:

"The court instructs the jury that if they believe from the evidence that the sidewalk on the bridge, where the injury

complained of by the plaintiff was sustained, was in a reasonably safe condition for a person of ordinary caution and prudence to have passed over, in the ordinary mode of travel, at the time the plaintiff sustained the injury complained of, and that, by reason of her age and want of capacity, the plaintiff could not exercise ordinary caution and prudence to avoid accident on the streets, sidewalks, and bridges of the city of Roanoke, and that the accident would not have occurred but for such incapacity, and that the parents of the plaintiff permitted her to go upon the sidewalk on said bridge without being accompanied with a person of ordinary caution and prudence to care for and protect her from danger, that the accident causing the injury was the result of the negligence of the parents of the plaintiff, and not the negligence of the city of Roanoke, and they must find for the defendant."

This instruction was plainly erroneous, and was rightly refused. It sought to have the court tell the jury that, if the parents of the plaintiff were negligent in allowing her to go upon the bridge or sidewalk where she was injured, such negligence of her parents was to be imputed to her,—a doctrine which this court said, in Railroad Co. *v.* Groseclose's Adm'r, *supra*, had been repudiated in this state, as in many other states of the Union, and the contrary doctrine established; citing a long line of authorities in support of this view of the law, among which is Ormsby's Case, 27 Grat. 455. In that case, an instruction just the reverse of the defendant's instruction No. 3, asked in this case, was sanctioned and approved by the court. In that case the plaintiff was only 2 years and 10 months old, and the instruction referred to told the jury that, although they believed that the parents of the child did not exercise ordinary care in allowing their child to be on the street without an attendant, yet the defendant was liable. It being an action brought by the child, it was its cause of action, and he was not responsible for the negligence of his parents.

Same—Imputable Negligence.

The court in the eleven instructions given at the defendant's instance, and two given *ex mero motu*, covered every phase of the law applicable to the case that the defendant could reasonably have asked. It gave all that were asked by the defendant except one, and without amendment except three, and no valid objection is urged here against the amendment to these.

The remaining assignments of error requiring our consideration, which may be considered together, are to the refusal of the court to set aside the verdict of the jury, and grant the defendant a new trial, on the ground that it is excessive and contrary to the law and the evidence. As the case was fairly submitted to the jury, but little need be said upon these assignments of error.

That the bridge through which the plaintiff fell was at the time of the accident, and had been for a long while before, in a very bad condition, is clearly proven, and not seriously controverted. At the point of the accident there was a hole in the sidewalk or footway 1 foot wide and 5 feet long, divided into three sections, 12 inches wide by 20 inches long, by four sills, to allow for the projection of the planks on either side of the bridge, the depth to the ground beneath being 35 feet. That this hole had been there for more than a month prior to the accident is the uncontradicted proof (some of the witnesses say much longer), and that the city had notice of the condition of the bridge, and of the existence of the hole through which this unfortunate child fell, while passing over the bridge with her younger brother to the opposite side of the river, is not left in doubt by the evidence. Her injuries are shown to be of a permanent and grievous character. The breaking of her leg near the thigh in two places has shortened the limb an inch and a quarter or more, attended with the wasting away of the limb. There was a total paralysis of her lower limbs for several weeks, and a partial paralysis of those limbs and her lower organs, impairing her bodily functions, continuing when the trial was had, nearly six

Excessive Verdict.

months after her injury, and there had been no improvement in her condition during the three months previous to the trial, as testified to by her attending physician. He was asked on the witness stand as to her prospects of recovery from this paralysis, and replied, "Not very bright."

The case is clearly one in which we can neither say that the verdict is without evidence to sustain it nor that the evidence is insufficient to support the verdict; therefore the judgment complained of must be affirmed.

HARRISON, J., absent.

NOTES.

Injuries to Children—Negligence of Legal Custodian Imputed to Child.—In some jurisdictions it is held that the negligent conduct of a legal custodian in allowing a child *non sui juris* to be negligently injured is contributory negligence which will be imputed to the child.

California.—Shierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Meeks *v.* Southern Pac. R. Co., 52 Cal. 604, 56 Cal. 513, 38 Am. Rep. 67.

Delaware.—Kyne *v.* Wilmington, etc., R. Co., 8 Houst. (Del.) 185.

Indiana.—Jeffersonville, etc., R. Co. *v.* Bowen, 40 Ind. 535; Pittsburgh, etc., R. Co. *v.* Vining, 27 Ind. 513, 92 Am. Dec. 269; Lafayette, etc., R. Co. *v.* Huffman, 28 Ind. 287, 92 Am. Dec. 318; Hathaway *v.* Toledo, etc., R. Co., 46 Ind. 25; Sullivan *v.* Toledo, etc., R. Co., 58 Ind. 26; Indiana Mfg. Co. *v.* Millican, 87 Ind. 87; Terre Haute St. R. Co. *v.* Tappenbeck, 9 Ind. App. 422; Louisville, etc., R. Co. *v.* Sears, 11 Ind. App. 654.

Kansas.—Atchison, etc., R. Co. *v.* Smith, 28 Kan. 541; 8 Am. & Eng. R. Cas. 327; Horton *v.* Trompeter (Kan. 1894), 35 Pac. Rep. 1106.

Maine.—Leslie *v.* Lewiston, 62 Me. 468; Brown *v.* European, etc., R. Co., 58 Me. 384; O'Brien *v.* McGlinchy, 68 Me. 552.

Maryland.—McMahon *v.* Northern Cent. R. Co., 39 Md. 438; Baltimore City Pass. R. Co. *v.* McDonnell, 43 Md. 534.

Massachusetts.—Lynch *v.* Smith, 104 Mass. 52, 6 Am. Rep. 188; Gibbons *v.* Williams, 135 Mass. 333; McGeary *v.* Eastern R. Co., 135 Mass. 363, 15 Am. & Eng. R. Cas. 407; O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352, 15 Am. & Eng. R. Cas. 362; Wright *v.* Walden, etc., R. Co., 4 Allen (Mass.) 283; Grant *v.* Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449; Casey *v.* Smith, 152 Mass. 294, 23 Am. St.

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Rep. 842. *Compare* Wiswell *v.* Doyle, 160 Mass. 42, 39 Am. St. Rep. 451.

Minnesota.—Fitzgerald *v.* St. Paul, etc., R. Co., 29 Minn. 336, 8 Am. & Eng. R. Cas. 310, 43 Am. Rep. 212.

New York.—Ihl *v.* Forty-second St., etc., R. Co., 47 N. Y. 323, 7 Am. Rep. 450; Cosgrove *v.* Ogden, 49 N. Y. 255, 10 Am. Rep. 361; McVee *v.* Watertown, 92 Hun (N. Y.), 306; Stackus *v.* New York Cent., etc., R. Co., 79 N. Y. 464; Weil *v.* Dry Dock, etc., R. Co., 119 N. Y. 147; Huerzeler *v.* Central Cross Town R. Co., 139 N. Y. 490; Kitchell *v.* Brooklyn Heights R. Co., 6 N. Y. App. Div. 99; Stone *v.* Dry Dock, etc., R. Co., 115 N. Y. 104; Bennett *v.* Brooklyn Heights R. Co., 1 N. Y. App. Div. 205; Lannen *v.* Albany Gas-Light Co., 44 N. Y. 459; Mangam *v.* Brooklyn R. Co., 38 N. Y. 456; Cunningham *v.* Brooklyn City R. Co., 104 N. Y. 669, 5 N. Y. St. Rep. 737; Albert *v.* Albany R. Co., 5 N. Y. App. Div. 544; Canavan *v.* Stuyvesant, 12 Misc. Rep. (N. Y. C. Pl.) 74; Muller *v.* Minken, 5 Misc. Rep. (N. Y. Super. Ct.) 444. But see Hennessey *v.* Brooklyn City R. Co., 6 N. Y. App. Div. 206, an action brought by an infant less than two years of age, to recover for injuries sustained by a collision with the defendant's train when he was riding in the lap of his mother, the father driving the carriage. It was held that under the circumstances the negligence of the father could not be imputed to the child, as the latter was in the immediate custody of the mother, whose negligence only was imputable to the child. And see also Metcalfe *v.* Rochester R. Co., 12 N. Y. App. Div. 147; Coghlan *v.* Third Ave. R. Co., 7 N. Y. App. Div. 124.

Same—Same—Doctrine Denied.—In other jurisdictions it is held that the negligence of its legal custodian is not imputable to the child, because it is in no way responsible for the danger, had no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not be charged with the fault of such person in allowing it to be exposed to danger which it had not the capacity either to know or to avoid.

United States.—Berry *v.* Lake Erie, etc., R. Co., 70 Fed. Rep. 679. Here it was further held that the question was one of general law, to be decided by a federal court according to its own views, uncontrolled by the decisions of the state court. The decision is contrary to the rule of the courts of *Indiana*, in which state the case arose.

Alabama.—Government St. R. Co. *v.* Hanlon, 53 Ala. 70; Bay Shore R. Co. *v.* Harris, 67 Ala. 6.

Connecticut.—Birge *v.* Gardner, 19 Conn. 507, 50 Am. Dec. 261; Bronson *v.* Southbury, 37 Conn. 199; Daley *v.* Norwich, etc., R. Co., 26 Conn. 591, 68 Am. Dec. 413.

Georgia.—Ferguson *v.* Columbus, etc., R. Co., 77 Ga. 102; Atlanta, etc., Air-Line R. Co. *v.* Gravitt, 93 Ga. 369, 44 Am. St. Rep. 145.

Notes

Illinois.—Chicago City R. Co. *v.* Wilcox (Ill. 1890), 24 N. E. Rep. 419, 44 Alb. L. J. 70, 138 Ill. 370, *affirming* 33 Ill. App. 450, *explaining* Hund *v.* Geier, 72 Ill. 393; Toledo, etc., R. Co. *v.* Grable, 88 Ill. 441; Chicago *v.* Hesing, 83 Ill. 204, 25 Am. Rep. 378; Chicago *v.* Starr, 42 Ill. 174, 89 Am. Dec. 422; Chicago, etc., R. Co. *v.* Becker, 76 Ill. 25, 84 Ill. 483; Gavin *v.* Chicago, 97 Ill. 66, 37 Am. Rep. 99; Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 226; Pittsburg, etc., R. Co. *v.* Bumstead, 48 Ill. 221, 95 Am. Dec. 539; Chicago *v.* Major, 18 Ill. 349, 68 Am. Dec. 553; Aurora Branch R. Co. *v.* Grimes, 13 Ill. 585; Chester *v.* Porter, 47 Ill. 66.

Iowa.—McCaull *v.* Bruner, 91 Iowa 214; Wymore *v.* Mahaska County, 78 Iowa 396, 16 Am. St. Rep. 449.

Louisiana.—Westerfield *v.* Levis, 43 La. Ann. 63.

Michigan.—Battishill *v.* Humphreys, 28 Am. & Eng. R. Cas. 597, 57 Am. Rep. 474, *note*; Shippy *v.* Au Sable, 85 Mich. 280. *Compare* Apsey *v.* Detroit, etc., R. Co., 83 Mich. 432.

Missouri.—Frick *v.* St. Louis, etc., R. Co., 75 Mo. 542, 595, 8 Am. & Eng. R. Cas. 280; Boland *v.* Missouri R. Co., 36 Mo. 490; Winters *v.* Kansas City Cable R. Co., 99 Mo. 509, 17 Am. St. Rep. 591. *Compare* Shaw *v.* Missouri Pac. R. Co., 104 Mo. 648.

Nebraska.—Huff *v.* Ames, 16 Neb. 139, 49 Am. Rep. 716.

New Hampshire.—Bisaillon *v.* Blood, 64 N. H. 565.

New Jersey.—Newman *v.* Phillipsburg Horse Car R. Co., 52 N. J. L. 446.

North Carolina.—Bottoms *v.* Seaboard, etc., R. Co., 114 N. Car. 699, 41 Am. St. Rep. 799.

Ohio.—Bellefontaine, etc., R. Co. *v.* Synder, 18 Ohio St. 400, 98 Am. Dec. 175; Cleveland, etc., R. Co. *v.* Manson, 30 Ohio St. 451; St. Clair St. R. Co. *v.* Eadie, 43 Ohio St. 91, 54 Am. Rep. 802, 23 Am. & Eng. R. Cas. 269.

Pennsylvania.—Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Philadelphia, etc., R. Co. *v.* Long, 75 Pa. St. 257; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187; Smith *v.* O'Connor, 48 Pa. St. 218, 86 Am. Dec. 582.

Tennessee.—Whirley *v.* Whiteman, 1 Head (Tenn.) 610.

Texas.—Douglas *v.* Central Texas, etc., R. Co. (Tex. Civ. App. 1894) 26 S. W. Rep. 892; Texas, etc., R. Co. *v.* Fletcher, 6 Tex. Civ. App. 736; Western Union Tel. Co. *v.* Hoffman, 80 Tex. 420, 9 Ry. & Corp. L. J. 455; Allen *v.* Texas, etc., R. Co. (Tex. Civ. App. 1894), 27 S. W. Rep. 943.

Vermont.—Robinson *v.* Cone, 22 Vt. 213, 54 Am. Dec. 67.

Virginia.—Norfolk, etc., R. Co. *v.* Ormsby, 27 Gratt. (Va.) 455; Norfolk, etc., R. Co. *v.* Groseclose, 88 Va. 267, 29 Am. St. Rep. 718.

Washington.—Roth *v.* Union Depot Co., 13 Wash. 525.

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West Virginia.—Dicken *v.* Liverpool Salt, etc., Co., 41 W. Va. 511; Gunn *v.* Ohio River R. Co., 42 W. Va. 676.

Same—Distinction between Actions by Parents and Actions in Behalf of Children.—There is a distinction between cases brought in the name of the child itself, and cases brought by the parents to recover for the injuries sustained by them by reason of the homicide or injury of the child. When the parents sue, their negligence in exposing the child to injury will bar their recovery.

District of Columbia.—Moore *v.* Metropolitan R. Co., 2 Mackey (D. C.) 437.

Michigan.—Battishill *v.* Humphreys, 64 Mich. 514, 28 Am. & Eng. R. Cas. 597.

Mississippi.—Westbrook *v.* Mobile, etc., R. Co., 66 Miss. 560, 14 Am. St. Rep. 587.

Pennsylvania.—Smith *v.* Hestonville, etc., Pass. R. Co., 92 Pa. St. 450, 2 Am. & Eng. R. Cas. 12, 37 Am. Rep. 705; Westerberg *v.* Kinzua Creek, etc., R. Co., 142 Pa. St. 471, 24 Am. St. Rep. 510.

Tennessee.—Bamberger *v.* Citizens' St. R. Co., 95 Tenn. 18.

Texas.—Williams *v.* Texas, etc., R. Co., 60 Tex. 205, 15 Am. & Eng. R. Cas. 403.

And this is a correct rule in all jurisdictions. But, as the cases just cited show, the contributory negligence of the parent will not keep the child from recovering, except in jurisdictions that have fully adopted the rule in Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

In this case it was held that parents permitting a child two years old to be in a public highway unattended are guilty of such contributory negligence as will defeat an action in the child's name for an injury done to it by the negligence of a traveler in the highway. And see Erie City Pass. R. Co. *v.* Schuster, 113 Pa. St. 412, 57 Am. Rep. 471; Glassey *v.* Hestonville, etc., Pass. R. Co., 57 Pa. St. 172; North Pennsylvania R. Co. *v.* Mahoney, 57 Pa. St. 187.

Whether Negligence of Parent Imputable to Child—Question for Jury.—It should also be noted that in some of the cases the rule of Hartfield *v.* Roper, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, is held in the modified form, the question of the contributory negligence of the parents which will bar the child being held a question of fact for the jury, not of law for the court. McGeary *v.* Eastern R. Co., 135 Mass. 363, 15 Am. & Eng. R. Cas. 407; O'Connor *v.* Boston, etc., R. Corp., 135 Mass. 352, 15 Am. & Eng. R. Cas. 362; Texas Mexican R. Co. *v.* Herbeck, 60 Tex. 602; Galveston, etc., R. Co. *v.* Moore, 59 Tex. 64, 10 Am. & Eng. R. Cas. 746, 46 Am. Rep. 265. See Parish *v.* Eden, 62 Wis. 272; Hoppe *v.* Chicago, etc., R. Co., 61 Wis. 357.

FROHS

v.

CITY OF DUBUQUE.

(*Supreme Court of Iowa, Oct. 10, 1899.*)

Defective Sidewalk—Personal Injuries—Evidence of Subsequent Repairs.—In an action against a municipality, for injuries received by plaintiff from a fall caused by a loose board in a sidewalk, evidence of the fact that the old walk was taken up and a new one laid after the accident was admissible to show how it came that witnesses knew the condition of the stringers upon which the boards were laid.

Instructions.—As no instruction limiting the affect of such evidence was requested, defendant was not entitled to complain because such an instruction was not given.

Evidence.—In such action, evidence was admissible to show that the walk was built of old boards and stringers, as bearing upon the question of notice to the city of its condition; as plaintiff alleged that the material in the walk was badly decayed, and the city was chargeable with notice of the fact.

Same—Similar Accidents at Same Place.*—In such action, evidence was admissible to show that a witness, a few days before the accident, had tripped upon the same loose board which caused plaintiff's fall, for the purpose of proving the existence of such board, and the manner in which it was discovered by the witnesses.

Same—Ordinances—Municipal Duties.—In such action, it was not error to admit in evidence certain ordinances of defendant, to show that it had assumed the care and control of its sidewalks, although they were not pleaded, as such duty attached necessarily to defendant's municipal character, which was not put in issue.

Damages—Loss of Wife's Services—Right of Action.—The right of action for the loss of the wife's services through negligence is not in the wife, but in the husband; and in an action by the wife for her personal injuries such loss is not recoverable, although such item of damages is claimed by the petition, and the answer is a general denial, and evidence of such loss is admitted without objection.

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*See generally Gable *v.* City of Kansas City, 1 Mun. Corp. Cas. 491, and *notes*, 497 *et seq.*

Frohs *v.* City of Dubuque

Excessive Verdict.—But defendant will not be held entitled to a reversal for an error of $6.00 excess in the verdict, where the trial court was not asked to order a *remittitur*.

APPEAL by defendant from Dubuque county district court. *Affirmed.*

Duffy & McGuire, for appellant.

Henderson, Hurd, Lenehan & Kiesel, for appellee.

WATERMAN, J. Plaintiff was hurt by falling over a loose board in a walk. After her injury, the owner of the abutting lot took up the old walk, and laid a new one. Evidence of this fact was received over defendant's objection. It is manifest, from the examination of the witnesses on this point, that the fact mentioned was elicited only incidentally. The circumstance of the old walk being taken up was not offered as evidence tending to establish that it was defective, but merely as showing how it came the witnesses knew the condition of the stringers upon which the boards were laid. The court, in admitting the evidence, stated that its scope should be so limited. The admission of this evidence it is thought is contrary to the rule announced in Cramer *v.* City of Burlington, 45 Iowa, 627, and Hudson *v.* Railroad Co., 59 Iowa, 581, 13 N. W. 735; but we cannot coincide in this view. In the first of these cases we held that the fact of a subsequent change made in the walk by defendant could not be received and considered as evidence of an admission of a previous defect. In the other case the decision was that evidence of subsequent repairs could not be received as tending to establish prior negligence. We are entirely satisfied with the doctrine announced in these cases, and do not think the action of the court in the case at bar is in any way in conflict with it. Kuhns *v.* Railway Co., 76 Iowa, 67–71, 40 N. W. 92. It may be that the defendant was entitled to an instruction limiting the effect of the evidence to the extent stated, but, as no such instruction was asked, the failure to give it cannot now be taken advantage of. See the case last cited.

Defective Sidewalk—Personal Injuries—Evidence of Subsequent Repairs.

Instructions.

The next ground of complaint is that evidence was received relating to the original construction of the walk, which was built some considerable time before the accident to plaintiff. This testimony was to the effect that the walk was built of old boards and stringers. It was plaintiff's claim that the material in the walk was badly decayed, and that the city should have had notice of the defect. This evidence was not introduced, as defendant's counsel seem to think, in order to show negligence in the original construction, but only as bearing upon the question of notice to the city of the condition of decay. For this purpose it was properly admitted. McConnell *v.* City of Osage, 80 Iowa, 293, 45 N. W. 550; Lorig *v.* City of Davenport, 99 Iowa, 479, 68 N. W. 717.

Evidence.

One French and his wife were witnesses, and they were allowed to testify that, a few days before the accident to plaintiff, Mrs. French tripped upon the same loose board of which complaint is made in this case. It is insisted that evidence of other accidents was not admissible; and this is correct, where such evidence is relied upon as substantive proof of an actionable defect. Hudson *v.* Railroad Co., 59 Iowa, 581, 13 N. W. 735; Croddy *v.* Railway Co., 91 Iowa, 598, 60 N. W. 214; Mathews *v.* City of Cedar Rapids, 80 Iowa, 459, 45 N. W. 894; Langhammer *v.* City of Manchester, 99 Iowa, 295, 68 N. W. 688. But in the case at bar the evidence was offered to show the existence of this particular loose board in the walk prior to plaintiff's injury, and the manner in which it was discovered by the witnesses. For this purpose the testimony was properly admissible. In Hunt *v.* City of Dubuque, 96 Iowa, 314, 65 N. W. 319, the question presented here was raised, and we said upon the subject: "The witness was also permitted to state that she had seen people stumble at the defective part of the walk, and that she saw an old gentleman stop, and push the board down with his cane. The testimony tended to show the condition of the walk, and was material for the purpose of showing that the

Same—Similar Accidents at Same Place.

condition continued until the accident occurred." Smith *v.* City of Des Moines, 84 Iowa, 685–688, 51 N. W. 77, also supports the ruling of the trial court in the case at bar. We also call attention, in this connection, to Alberts *v.* Village of Vernon (Mich.) 55 N. W. 1022; Moore *v.* City of Kalamazoo (Mich.) 66 N. W. 1089. Three of the authorities noted above as cited by appellant are cases where the defect complained of was in the original construction, and in the other (Croddy *v.* Railway Co.), which involved an accident at a railway crossing one element of the negligence complained of was the excessive speed of the train. It is manifest that in none of these instances does the same reason obtain for admitting this kind of evidence as in the case at bar, where the effect was caused by time and changing conditions, and notice of it to defendant had to be shown; and when also the evidence related to it specifically, and not to a general bad condition of the walk.

Same—Ordinances—Municipal Duties.

In order to show that defendant had assumed the care and control of the sidewalks within its limits, plaintiff offered in evidence an ordinance of defendant city providing for the laying of such walks, an amendment relating to their reconstruction, and also an ordinance providing for the appointment of a sidewalk commissioner. This evidence was objected to, but its introduction was permitted. This action of the court, it is insisted, was erroneous. The argument of appellant is that these ordinances were not admissible, because not pleaded. If this action was founded upon the ordinances, appellant's line of reasoning would apply; but such is not the case. We do not think plaintiff was called upon to offer proof of this kind. The municipal character of the defendant was not put in issue, and the duty sought to be proved attaches necessarily to that character. 2 Dill. Mun. Corp. 998. But, if it was unnecessary to make the proof, it does not follow that the court erred in permitting it to be done. The ground argued here for the complaint is certainly not good. Fernbach *v.* City of Waterloo, 76 Iowa, 598, 41 N. W. 370.

Frohs *v.* City of Dubuque

Plaintiff was a married woman, residing with her husband. The twenty-first paragraph of the trial court's charge is challenged, as permitting the jury to award plaintiff, as part of her damages, the amount paid by her for domestic service during her disability. While the instruction is somewhat ambiguous, we are inclined to think appellant interprets it fairly. Under our repeated decisions, the right of action for the loss of the wife's services in the household is in the husband. Hall *v.* Town of Manson, 90 Iowa, 585, 58 N. W. 881, and cases cited. It is urged, however, that the petition specially claimed for this item; and as the answer was a general denial, and the evidence admitted without objection, the court was warranted in submitting the issue to the jury. We cannot concur in this view. This is not a case where an issue not presented in the petition is supplied by evidence not objected to, as in Collins *v.* Collins, 46 Iowa, 60. Here, while the evidence showed the loss, it did not show a right of recovery in the wife. There was a failure of proof, and defendant took advantage of it by exception to the instruction. But there is another matter to be considered in this connection. The only objection presented by appellant to the instruction is that it authorized the jury to find in plaintiff's favor for loss of time, as stated. The amount paid by plaintiff on this account, and for which a recovery was permitted under this instruction, was just six dollars. We shall not reverse for this slight excess, and, as the trial court was not asked to order a *remittitur*, we shall not attempt a correction of the judgment in that manner. Our action in both of these respects has full support in Van Gorder *v.* Sherman, 81 Iowa, 403, 46 N. W. 1087. In that case we refused to reverse for an error of $12.18 excess in the verdict, and declined to order a *remittitur*, because the matter had not been presented to the trial court for correction. Affirmed.

Damages—Loss of Wife's Services—Right of Action.

Excessive Verdict.

SHEEHY

v.

CITY OF NEW YORK.

(*Court of Appeals of New York, Oct. 3, 1899.*)

Personal Injuries — Notice of Intent to Sue — Evidence.*—The statute of New York, providing that a notice of intent to sue the city of New York for personal injuries caused by negligence shall be filed with the corporation counsel within six months after the cause of action accrued, states in general terms the nature of the notice, but does not prescribe its form; and plaintiff in such an action, in order to show compliance with the statute, was entitled to prove that one of the books kept in the office of the corporation counsel contained an entry showing that he had received a notice of intention to bring the action which he regarded as the notice required by the statue, and specifying the name and residence of plaintiff, the date of the notice, the cause of action, the date and cause of the accident, and the nature and location of the defect.

Same—Same.—Under such statute, where an effort has been made to comply with its provisions in regard to notice of intent to sue the city for personal injuries, and the notice served, when reasonably construed, is such as to provide means by which the city can more readily pursue an investigation as to the merits of the claim than if longer postponed; the notice is sufficient.

Same—Same.—The notice required by such statute relates to the remedy, and not to the right; and it is not quite correct to term it a part of plaintiff's cause of action.

APPEAL by plaintiff from First department appellate division supreme court. *Reversed.*

David McClure, for appellant.

Theodore Connoly, for respondent.

MARTIN, J. Only a single question was passed upon by either of the courts below, and is the only one presented for

*See generally Lyons *v.* City of Red Wing, 1 Mun. Corp. Cas., and *note*, 489.

review by this court. It relates to the construction of chapter 572 of the Laws of 1886, and is whether the notice served by the plaintiff was a sufficient compliance with that statute. That act, in effect, provides that no action shall be maintained against the city of New York for damages for personal injuries alleged to have been caused by its negligence, unless notice of the intention to commence such action shall have been filed with the counsel for the corporation within six months after the cause of action accrued. That the plaintiff endeavored to comply with this provision of the statute, and that it was understood by the corporation counsel to have been complied with, there can be little doubt. The accident which was the basis of this action occurred on the 22d of September, 1894. On the 10th of the following November the plaintiff prepared a notice, which was filed in the office of the corporation counsel on November 12th, and was as follows: "In the Matter of the Claim of Agnes Sheehy against the Mayor, Aldermen, and Commonalty of the City of New York—Gentlemen: Please take notice that Agnes Sheehy claims and demands from the mayor, aldermen, and commonalty of the city of New York five thousand dollars damages for personal injuries sustained by her by falling upon the sidewalk on the west side of Washington avenue, in the city of New York, between One Hundred and Seventy-Fourth and One Hundred and Seventy-Fifth streets, on the 22d day of September, 1894; there being at the time a deep hole or depression in the sidewalk at that point, and the street gaslights not being lit. Dated New York, November 10th, 1894. Respectfully yours, Agnes Sheehy, Claimant. R. & E. J. O'Gorman, Attorneys for Agnes Sheehy, 49 and 51 Chambers Street, New York City. To Hon. Ashbel P. Fitch, Comptroller, and Hon. William H. Clark, Counsel to the Corporation." The contention of the respondent, which has prevailed in the courts below, is that the notice was insufficient, because it contained no statement of an intention to commence an action. The point upon which this appeal must turn is a very narrow one, and is whether the notice filed was in substantial

compliance with the requirements of the statute in that respect.

The statute prescribes no form, although it states, in general terms, the nature of the notice required. Its purpose was that a notice should be given which would inform the law officer of the city of the nature of the claim, the place where and the circumstances under which it arose, and of a purpose on the part of the plaintiff to enforce it. That the notice in this case entirely fulfilled this purpose the plaintiff offered to prove, but the evidence was rejected. She offered to show that one of the books kept in the office of the corporation counsel contained the following: "Notice of intention to commerce action, chapter 572, Laws of 1886. Nov. 10. Agnes Sheehy; R. & E. J. O'Gorman, 49–51 Chambers street. Sept. 22, '94. West side of Washington avenue, bet. 174th & 175th St. Personal injuries caused by falling into a deep hole in sidewalk. $5,000 claimed." This evidence, if admitted, would have shown that the notice given by the plaintiff was received and filed in the proper office, that the law officer of the corporation plainly regarded it as the notice provided for by the statute, and that it answered every purpose for which it was intended. We think this evidence was clearly admissible, and that the plaintiff's exception to its rejection was well taken.

Personal Injuries —Notice of Intent to Sue—Evidence.

Moreover, we are of the opinion that the notice was sufficient, when construed in the light of the circumstances existing at the time, and that it indicated upon its face an intention on the part of the plaintiff to enforce her claim by suit, if necessary. It is entitled in the matter of the claim of the plaintiff against the city. It declares that the plaintiff claims and demands from the city damages for personal injuries. It is signed by the plaintiff, and by her attorneys as well, the latter giving their post-office address, as required on formal papers in legal proceedings. No statute existed, except the act of 1886, under which such notice could have been filed with the corporation counsel. He could never

Same—Same.

have supposed that the notice was idle or gratuitous, but must have understood that it was served under the statute. If the rejected proof had been admitted, it would have shown clearly his understanding of the purpose of the notice, and of the intent of the plaintiff to enforce her claim. The plain object of this statute was to provide means by which a city could better guard against the imposition of unfounded claims by being at once informed of their existence, so that its officers might more readily pursue an investigation of their merits than if longer postponed. On the other hand, it could not have been its purpose to deny to a party injured by the negligence of a city any remedy against it, nor to unnecessarily embarrass parties in the enforcement of their rights. While, in an action like this, the statute must be substantially complied with or the plaintiff cannot recover, still, where an effort to comply with it has been made, and the notice served, when reasonably construed, is such as to accomplish the object of the statute, it should, we think, be regarded as sufficient.

Same—Same.

The claim that the service of a proper notice, under the statute, constituted a part of the plaintiff's cause of action, is not quite correct. The absence or presence of such a notice relates to and affects the procedure, rather than the cause of action. It relates to the remedy, and not to the right. This we have held in the Missano Case (decided at this term, but not yet officially reported) 54 N. E. 744.

We are of the opinion that the trial court erred in rejecting the evidence of the entry made in the books of the corporation counsel, in holding that the notice in this case was insufficient under the statute, and in dismissing the complaint upon that ground. For these reasons the judgments of the trial court and of the appellate division should be reversed, and a new trial granted, with costs to abide the event. All concur (PARKER, C. J., on the ground that the notice given was in substantial compliance with the requirements of the statute). Judgments reversed, etc.

CITY OF HUNTINGTON

v.

FOLK.

(*Supreme Court of Indiana, Oct. 5, 1899.*)

Pleadings—Amendments.—When an amended pleading is filed it supersedes the original, and the latter goes out of the record.

Same—Appeal—Record.—When a pleading upon which error is specified on appeal to the supreme court is absent from the record, no question in respect to its sufficiency can be considered.

Superseded Pleadings—Appeal—Record.—Where an original complaint superseded by an amended complaint is not in the record, and has not been incorporated therein by a bill of exceptions, it cannot be considered on appeal for any purpose.

Continuance—Same—Same.—An application for a delay or continuance of a cause is addressed to the sound discretion of the trial court; and where it is not clearly disclosed on appeal that such discretion has been abused, to the injury of the complaining party, the refusal to grant the continuance will not be available error.

Defective Sidewalk—Personal Injuries—Knowledge of Defect.*—In an action against a municipality for plaintiff's personal injuries caused by the defective condition of a sidewalk, the fact that plaintiff was aware of the defect before the accident will not preclude recovery, unless it appears that she knew that such defect was of a dangerous character.

APPEAL by defendant from Wabash county circuit court. *Affirmed.*

France & Dungan, Kenner & Lesh, and *O. H. Bogue*, for appellant.

Spencer & Branyan, for appellee.

JORDAN, C. J. Appellee sued in the Huntington circuit court to recover damages for personal injuries sustained by her through appellant's alleged negligence in maintaining a defective sidewalk. The venue of the case was changed to the Wabash circuit court. There was a trial by jury in the latter court, and a general verdict

Case Stated.

*See *note*, 1 Municipal Corp. Cas. 490.

returned in favor of appellee, assessing her damages at $5,000, and along with this verdict the jury returned answers to a number of interrogatories. Over appellant's motion for judgment in its favor upon these answers notwithstanding the general verdict, and over its motion for a new trial, the court rendered judgment on the general verdict.

Counsel for appellant concede that the evidence is not properly in the record, and the only errors of those assigned which they argue are that the court erred as follows: First, in overruling appellant's motion to require appellee to make her amended complaint more specific; second, in overruling the demurrer to the amended complaint; third, in overruling appellant's application for a temporary continuance; fourth, in overruling the motion for judgment on the answers of the jury to interrogatories.

What purports to be the original complaint is copied by the clerk into the transcript. A motion to make this complaint more specific, it appears, was filed by the appellant on September 6, 1895, in the Huntington circuit court. The cause was filed on change of venue in the Wabash circuit court on April 2, 1896. On May 5, 1897, the appellee filed, in a single paragraph, what is denominated in the record as a "substituted complaint." After the filing of this latter complaint, appellant moved the court to require the appellee to make her complaint more specific, in this: To state in a specific manner: "First, what the defect was that caused the alleged fall and injury; second, the exact point where the fall occurred; third, what lot of Mr. Black's was the defect in the walk in front of? Give number of lot." The record recites that, pending this motion, leave was granted by the court to appellee to amend the complaint, and that the same was amended, and the court then overruled the motion to make more specific, and granted appellant 30 days in which to file a bill of exceptions. The complaint as amended is not in the record. Therefore the character or nature of the averments of this pleading as it existed after the aforesaid amendment

was made is not disclosed. The bill of exceptions recites the grounds upon which the motion to make more specific was based, and that it was overruled, but it is entirely silent as to the amendment which appellee made to her complaint; and we are left wholly ignorant in regard to its allegations after the amendment in question was made, and are uninformed as to what was disclosed upon the point of controversy after the complaint was changed by the amendment made pending the motion to make more specific. For aught appearing appellee may have amended her pleading so as to conform to the demands of appellant, and therefore, and for that reason, the motion was denied. It is evident from the condition of the record that we are not in a position to review the action of the trial court in denying the motion in controversy. After the overruling of this motion appellant seems to have demurred to the complaint for insufficiency of facts, and the transcript discloses that, pending this demurrer, upon leave granted, appellee again amended her complaint, and that the court thereupon overruled the demurrer; but neither is the complaint, as amended on this second occasion, nor the particular charges made therein by the latter amendment, set forth in the record. Nothing, therefore, appearing to the contrary, we may assume that the infirmities of the pleading of which the appellant complains were completely cured by the amendments made pending the demurrer, and before the court overruled it. The rule is well settled that when an amended pleading is filed it supersedes the original, and the latter goes out of the record. Consequently by this last amendment the complaint to which the demurrer was addressed was taken out of the record, and cannot be considered a part thereof on this appeal. The complaint, as last amended, we must presume to be the one upon which the cause was tried; and as this pleading, after it was amended, in no manner appears in the record, therefore no question is presented for review upon the assignment of error based upon the action of the court in overruling the demurrer to the complaint, or that the latter

Pleadings—Amendments.

does not state facts sufficient to constitute a cause of action. It is manifest that, when a pleading upon which error is specified on appeal to this court is absent from the record, no question in respect to its sufficiency can be considered. We have repeatedly affirmed that all cases in this court are tried by the record, and that erroneous rulings complained of must be properly exposed thereby, as all reasonable presumptions will be indulged in favor of the rulings of the trial court. Same—Appeal —Record.

Appellant contends that the court erred in denying its application for a temporary continuance. This ruling of the court was assigned as one of the reasons in the motion for a new trial, the overruling of which motion is also assigned as error in this appeal. It is shown by a bill of exceptions that appellant on May 4, 1897, moved for a continuance for the reason that at the commencement of the trial the court permitted the plaintiff to amend her complaint by inserting therein the following: "That the walk, as originally constructed, was made with stringers laid parallel with the line of the walk, about six inches apart, and boards laid across them, nailed to said stringers, and, as so made, was a safe and suitable walk; but, previously to and at the date aforesaid, said boards had been removed from said stringers for about four feet from the northeast corner of the lot aforesaid, leaving the space between said stringers open, in which said space loose boards were thrown, and allowed to so remain for three months prior to said date, and were placed about eight inches below the level of the walk." The motion for continuance was supported by affidavit, which is embodied in the bill of exceptions. This affidavit, among other things, refers the court to the original complaint, and states that the latter is made a part of the affidavit. It is further averred therein that nothing is alleged in the original complaint, which is stated to have been filed on April 1, 1895, about the defects which caused the injury to plaintiff, and that the changes made by the amendment will require

new and additional proof upon the part of the defendant, etc. Neither the original complaint referred to in the affidavit nor any of its averments are embraced in the bill of exceptions. The original complaint, being superseded by the filing of the substituted or amended complaint, as heretofore shown, was no longer in the record; and, as appellant has failed to incorporate it therein by a bill of exceptions, it cannot be considered on appeal for any purpose. In the absence, therefore, of that pleading, we are not advised in respect to its allegations on the particular theory which is advanced; and certainly, under such circumstances, we are not in an attitude to determine whether the amendment in question so changed or varied the original complaint as to introduce into the action a new theory, or create such an essential difference between it and the amended complaint as to require upon the trial, on appellant's part, as it is claimed, additional proof. The lower court had the advantage of having before it both the original complaint and the affidavit filed in support of the motion for a continuance, and was fully advised, we must presume, in respect to the facts therein averred and the statements made in the affidavit, and therefore, under the circumstances, was in a much better position than we are to determine whether the appellant had shown a good cause for continuance by reason of the amendment made to the complaint in controversy. Under section 397, Burns' Rev. St. (section 394, Rev. St. 1881; section 394, Horner's Rev. St. 1797), an application for a delay or continuance of a cause is addressed to the sound discretion of the trial court; and where, as in this case, for the reason stated, it is not clearly disclosed on appeal that such discretion has been abused, to the injury of the complaining party, the refusal to grant the continuance will not be available error. Moulder *v.* Kempff, 115 Ind. 459, 17 N. E. 906; Manufacturing Co. *v.* Bickford, 129 Ind. 236, 28 N. E. 545; Brandt *v.* State, 17 Ind. App. 311, 46 N. E. 682. Dadley *v.* Scanlon,

Continuance—Same—Same.

116 Ind. 8, 17 N. E. 158, under the facts as presented on the question involved, lends no support to appellant's contention.

It is finally urged that the court ought to have sustained appellant's motion for judgment in its favor upon the answers of the jury to the interrogatories, notwithstanding the general verdict, for the reason, as asserted, that these answers disclose that appellee was guilty of contributory negligence. We have read and considered the interrogatories, and discover no grounds for affirming that they are antagonistic, upon that question, to the general verdict. They reveal that when appellee stepped upon the sidewalk, at the time of the accident, she looked to see where she stepped, and that the board upon which she placed her foot appeared to be safe and firm to walk over; that there was no sidewalk on the opposite side of the street; and that the weather on the day of the accident was intensely cold, and the sidewalk where the accident occurred was her shortest and most usual route in going to and from the business portion of the city of Huntington. While it is true that the interrogatories show that appellee, prior to the time she was injured, had passed over the walk, and knew of its defective condition, still there is nothing in the special findings to disclose that she knew it was unsafe or dangerous. Her previous knowledge in respect to the defective condition of the sidewalk would not, alone, be conclusive upon the question of her contributory negligence, and thereby preclude a recovery by her upon the general verdict. Railroad Co. *v.* Sutton, 148 Ind. 169, 47 N. E. 462, and cases there cited. No available error being shown by the record, the judgment is therefore affirmed.

Defective Sidewalk—Personal Injuries—Knowledge of Defect.

CONRAD

v.

TOWN OF ELLINGTON.

(*Supreme Court of Wisconsin, Oct. 20, 1899.*)

Actions against Municipalities—Complaint—Amendment.—Under a statute making the filing of the bill or claim with the town clerk a condition precedent to a right of action against a town upon any claim or cause of action for which a money judgment only is demandable, it is error to allow the complaint to be amended on the trial by increasing the claim for damages.

Evidence—Medical Experts.—The admission of testimony of medical experts as to the cause of plaintiff's injuries, and their effect on his capacity to work, although such evidence was somewhat conjectural, was not reversible error.

Defective Highway—Personal Injuries—Evidence of Condition of Highway.*—In an action against a municipality for personal injuries alleged to have been caused by the defective condition of a corduroy road, it was not error to admit evidence to show the general bad condition of the highway at and in the vicinity of the place of the accident two days before it occurred.

Remarks of Court.—A remark of the trial judge, to the effect that he did not think plaintiff had increased the effects of his injuries by negligence, was not prejudicial to defendant; as it was not claimed that plaintiff was negligent in that respect.

Proximate Cause—Instructions.—An instruction as to proximate cause which is not misleading, when taken in connection with the whole charge of which it is a part, is not reversible error, although it is not in strict harmony with the law on the subject.

Contributory Negligence.—In such actions, the burden of proving contributory negligence is upon defendant, unless it is disclosed by plaintiff's evidence.

APPEAL by defendant from Outagamie county circuit court. *Modified.*

John Bottensek and *Humphrey Pierce*, for appellant.

Roemer & Spencer, for respondent.

*See Olson *v.* Town of Luck, *ante* 508, and *foot-note*.

Conrad *v.* Town of Ellington

CASSODAY, C. J. This action was commenced August 26, 1897, to recover damages for personal injuries sustained by the plaintiff June 21, 1896, about 12 m., by reason of an alleged defective highway, consisting of a hole or depression in the traveled portion thereof at the place described. Issue being joined, and trial had, at the close thereof the jury returned a special verdict to the effect: (1) That the plaintiff was injured by being thrown from a wagon at the time and place described; (2) that the highway at that place was in a defective condition for travel upon and over the same; (3) that said highway, on the evening before, was not in a reasonably safe condition for the travel passing over it; (4) that such defective condition of said highway at the time and place named was not caused by an unusual or extraordinary rainfall occurring during the night before the accident; (5) that the defendant did not have actual notice of such defect in time to have the same repaired before the accident; (6) but that such defect had existed for such a length of time before the accident that the defendant, in the exercise of ordinary care and diligence, would have known of such defect, and repaired the same; (7) that such defective condition of the highway was the proximate cause of the plaintiff's injuries; (8) that there was no want of ordinary care on the part of the plaintiff at the time of the accident which contributed to the injuries he received; (9) that the plaintiff sustained damages to the amount of $2,600. From the judgment entered thereon in favor of the plaintiff for that amount, the defendant brings this appeal.

Case Stated.

The plaintiff was injured June 21, 1896. On July 23, 1896, the plaintiff presented his claim against the town, and filed the same with the clerk, wherein he claimed that the defendant was liable in damages to him in the sum of $1,000 and the original complaint only demanded judgment of that amount. Afterwards, and on November 28, 1898, at the beginning of the second trial, the plaintiff was allowed, against

Actions against Municipalities—Complaint—Amendment.

objection, to amend his complaint, and increase his prayer for judgment to $5,000; and, as indicated, the jury assessed his damages at $2,600, and judgment was entered for that amount. With certain exceptions, the statute declares that: "No action upon any claim or cause of action for which a money judgment only is demandable * * * shall be maintained against any town unless a statement or bill of such claim shall have been filed with the town clerk to be laid before the town board of audit." Section 824, Rev. St. The filing of such statement or bill of such claim was essential to the maintenance of the action, and a failure to allege the same in the complaint would have been fatal on demurrer. Benware *v.* Town of Pine Valley, 53 Wis. 527, 10 N. W. 695; Eron *v.* Town of Stevens Point, 85 Wis. 379, 55 N. W. 410; McKibben *v.* Amory, 89 Wis. 607, 62 N. W. 416; Flieth *v.* City of Wausau, 93 Wis. 446, 67 N. W. 731. The "statement or bill" so required to be filed to be laid before the town board of audit necessarily included the amount of such claim. No such statement or bill was ever filed as to any claim in excess of $1,000. To allow the original complaint, 15 months after its service, to be thus amended by increasing the claim for damages, as stated, was, in our judgment, unauthorized. The court's attention was again called to the subject by an instruction requested to limit the damages to the amount named in the claim filed. In support of the ruling of the trial court, counsel rely upon Reed *v.* Mayor, etc., 97 N. Y. 620, where it was held that an estimate of the damages was not an essential part of the claim, and hence the complaint might be amended by increasing the amount of such claim. But it was under a statute declaring that: "No action shall be maintained against the mayor," etc., "unless the claim on which the action was brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same." The difference between the two statutes is radical, and the case is not an authority to be followed under our statute quoted.

2. Error is assigned because one of the plaintiff's medical

experts was allowed to testify to the effect that a man ridimg along over a corduroy road on a wagon with four wheels, and pitched out over the wheel into a hole, striking his shoulder onto the logs, might produce such an injury as that received by the plaintiff; that the injuries received by the plaintiff incapacitated him to the extent of about two-thirds,—that is to say, he was only capable of performing one-third as much manual labor as before the accident. True, such evidence was somewhat conjectural, but its only bearing was upon the question of damages, and, in view of what has already been said, we must hold that it is an error which does not affect any substantial right of the defendant, and therefore is not reversible error. Section 2829, Rev. St.

Evidence—Medical Experts.

3. Error is assigned because one of the witnesses for the plaintiff, after having testified without objection that the plaintiff had, two weeks before the trial, pointed out to him the place where he claimed he got hurt, and that he passed over the road two days prior to the accident in question, and that he then noticed something unusual in the road within four or five rods of the place where the plaintiff got hurt, was allowed to testify to the effect that he observed only one bad place within four or five rods from the place where the plaintiff said he got hurt, either way; that he was glad to get through, and did not calculate to go back, and never looked back; that his horse sank down; that he called "Whoa"; that the horse then crawled out; that the front wheels got in there, and he and his wife fell to the dashboard, and then immediately went over back. The only objection made to such testimony is that the witness did not definitely fix the spot where it occurred; that the place where it occurred was left, by the witness, too indefinite. We cannot hold that it was error to prove the general bad condition at and in the vicinity of the place in question of this corduroy road two days before the accident. Shaw *v.* President, etc., 74 Wis. 105, 42 N. W. 271; Barrett *v.* Village of Hammond, 87 Wis.

Defective Highway—Personal Injuries—Evidence of Condition of Highway.

654, 58 N. W. 1053. The case does not come within the ruling in the case of Olson *v.* Town of Luck (Wis.) 79 N. W. 29. Of course, the heavy rainfall the night before the accident made the road very much worse.

4. Error is assigned because, after one of the defendant's experts had been asked as to whether, in case of fractures of the bones of the shoulders and legs, people were not more or less crippled, the judge of the court said that he did not think there was any negligence in the conduct of the plaintiff up to the time the doctor was called in, that the doctor got to his home at about the same time that he did, and that he did not think any negligence could be predicated on that as a matter of law. We perceive no error in such remark in respect to a question of fact about which there was no dispute.

Remarks of Court.

5. Error is assigned because the court, among other things, instructed the jury upon the seventh question submitted to the effect that most men would say that the word "proximate" meant whether it was the direct and immediate cause of the injury or not, but that it means more than that in the law; that it will be necessary for them to find that in order to answer that question "Yes" it must appear from the evidence that the injury which the plaintiff received was not the natural and probable consequence of the negligence or wrongful act of the defendant, and that it ought to have been foreseen in the light of attending circumstances; that it means that the injury which the plaintiff received was the natural and probable cause of the defect existing in the highway, and that the town ought to have foreseen that such was, or might be, the result of the defect. While a portion of such instruction is not in strict harmony with what has so frequently been declared by this court to be the rule, yet, in view of the whole charge, we do not think it was misleading. The defendant's principal defense was that the defect in the highway was caused by the sudden and heavy rainfall the night before the accident, and hence that the defendant should be relieved from liability.

Proximate Cause —Instructions.

Allen *v.* City of Chippewa Falls, 52 Wis. 430, 9 N. W. 284. The court had already fully instructed the jury on that subject, and we cannot believe that the jury was misled on the question of proximate cause.

6. Error is assigned because the court refused to give an instruction requested upon the subject of contributory negligence in connection with the eighth question submitted. What was contained in the instruction was fully covered by the general charge, unless it was the portion which states that the plaintiff must show himself without negligence. That would have been equivalent to saying that the plaintiff had the burden of proving that he was free from contributory negligence. This court has frequently held that the burden of proving contributory negligence is ordinarily upon the defendant. An exception to such rule is when such contributory negligence is disclosed by the testimony on the part of the plaintiff. Hoye *v.* Railway Co., 67 Wis. 15, 29 N. W. 646, and cases there cited. Thoresen *v.* Railway Co., 94 Wis. 133, 68 N. W. 548. There was no error in refusing such instruction. The trial court was clearly justified in submitting the question of contributory negligence to the jury, notwithstanding the sudden and heavy rainfall. Jung *v.* City of Stevens Point, 74 Wis. 547, 43 N. W. 513; Wiltse *v.* Town of Tilden, 77 Wis. 152, 46 N. W. 234.

We find no error in the record, except as to the amount of damages allowed in excess of the amount named in the claim filed. So much of the judgment as is based upon a verdict in excess of $1,000 is reversed, with costs and disbursements, except that the defendant is not to be allowed for printing more than 25 pages, and the judgment in all other respects is affirmed.

CITY OF KANSAS CITY

v.

HANSON *et al.*

(*Supreme Court of Kansas, Oct. 7, 1899.*)

Contract for Paving Street—Repairs—Validity.—A contract for paving a city street and keeping it in repair for five years examined, and the agreement to repair construed to be a guaranty of the quality of the workmanship and material used in paving, and not a general obligation to make street repairs, irrespective of the causes making them necessary.

Same—Same—Same.*—A contract to pave a city street, and to make such repairs of it as may become necessary through indifferent work or the use of defective material, is not illegal, upon the assumption, without proof, that the obligation to repair increased the amount of the contractor's bid, and thereby imposed upon the abutting property owners a burden properly resting upon the general public of the city.

(Syllabus by the Court.)

ERROR by defendant from court of appeals. *Reversed.*

T. A. Pollock and *F. D. Hutchings*, for plaintiff in error. *True & True*, for defendants in error.

DOSTER, C. J. This was an action of injunction to restrain the city of Kansas City from enforcing the collection of assessment upon abutting property for the purpose of paying for a street pavement, upon the ground that the city council in making the contract for the improvement had included therein the estimated cost of repairs of the pavement for five years subsequent to the completion of the work. Judgment was rendered for the plaintiffs, which judgment was affirmed by the court of appeals. 55 Pac. 513. Error is prosecuted to this court.

Case Stated.

*See note at end of case.

The case is determinable upon the construction of the provisions of the contract in question. These read as follows: "The contractor expressly agrees to give a good and substantial bond to maintain in good order the aforesaid pavement for five years after the date of its acceptance, and binds himself, his heirs and assigns, to make all repairs which may, from any imperfection in said work or material, or from any crumbling or disintegration of the material, become necessary within that time; and contractor shall, whenever notified by the city engineer that repairs are necessary, at once make such repairs at his own expense, and, if they are not made within fifteen days after the date of said notice, the city engineer shall cause such repairs to be made at the expense and cost of the said contractor." "It is further agreed that whenever any repairs in the street are made necessary from the construction of sewers, laying of pipes or telegraph wires, or from any other disturbance of the pavement by parties acting under permit issued by the city engineer, the contractor shall, on notification from the city engineer, immediately cause all necessary repairs in conformity with the specifications for this class of work. The cost of such repairs, exclusive of back filling, which should be done by the parties holding the permit given in the same manner as now required by existing ordinances, shall be paid for, at the full contract price for a square yard of new pavement, out of the deposit made by the one holding the permit, upon notice of completion from the city engineer."

Contract for Paving Street—Repairs—Validity.

In the construction of a contract *inter partes*, as likewise other written instruments, the writing as a whole, as well as the particular part under consideration, must be looked at. Every portion of it must be given due weight, and the intent of the parties collected out of all its terms. So doing in this case, there does not seem to be much difficulty in arriving at a correct conclusion as to the meaning of the contract. The first clause, standing by itself, would seem to uphold the contention of

the defendants in error. It reads as follows: "The contractor expressly agrees to give a good and substantial bond to maintain in good order the aforesaid pavement for five years after the date of its acceptance." Thus far quoted, this, in connection with other parts of the instrument, is an agreement not only to build, but to keep in repair; and from it we might well conclude that, the contractor's obligation being not merely to build, but to repair as well, the cost of repairs during the time stated was included in the amount of his bid. If so, the contract would be illegal, because the cost of the repair of streets in cities, except as presently mentioned, is a general public burden, and cannot be imposed upon the abutting property owners. The above-quoted clause, however, is not the whole contract. Following it, in immediate sequence and connection, the instrument reads, "and binds himself, his heirs and assigns, to make all repairs which may from any imperfection in said work or material, or from any crumbling or disintegration of the material, become necessary within that time." Rightly construed, the last quotation is a specification of the kind of repairs which the contractor, in the clause first quoted, agreed to make. Rightly construed, the two clauses together mean that the contractor binds himself to make all repairs which might become necessary through his imperfect work or imperfect material, and agrees to give a bond that he will do so. If it had been the design of the parties to make an agreement binding the contractor in general terms to make any and all repairs of the pavement for five years, irrespective of the causes which made them necessary, the whole of the instrument following the clause first quoted might have been omitted. That, standing by itself, obligates to the making of repairs made necessary by any and every cause. The fact that in immediate connection with it a specific character of repairs was contracted for quite clearly indicates that it was the intention of the parties to limit the general language of the first clause by the specific and definite terms of the latter one. This, too, is what the

Note

law will do in its effort to ascertain the intent of parties to such instruments, and to give effect to their engagements. Bish. Cont. §§ 382–409. We feel quite clear that the instruments should be construed as an agreement to make such repairs only as became necessary on account of indifferent workmanship or defective material used by the contractor. In other words, it is a guaranty by the contractor of the quality of material used and charactor of work performed by him. The taking by the city council of such a guaranty cannot in law be held to increase the cost of the pavement, or to impose upon the property owners payment for future repairs, and there was no evidence that the amount of the contractor's bid was in fact increased by the imposition of an obligation to make the repairs in question. The use of reasonably good material and the employment of reasonably skillful workmen are implied in the making of every such contract. To express in words what is thus implied, and to take security for the fulfillment of the obligation, cannot be regarded as an onerous burden upon the taxpayer. Construing the contract as a guaranty of the quality of material and workmanship, the authorities are uniform in upholding its validity. Robertson *v.* City of Omaha (Neb.) 76 N. W. 442; Paving Co. *v.* Ullman (Mo. Sup.) 38 S. W. 458; Allen *v.* City of Davenport (Iowa) 77 N. W. 532; Wilson *v.* Inhabitants of City of Trenton (N. J. Err. & App.) 40 Atl. 575; Cole *v.* People (Ill. Sup.) 43 N. E. 607.

Same—Same—Same.

The defendants in error have filed a motion to dismiss, but it is without merit, and is overruled. The judgments of the court of appeals and the court of common pleas are reversed, with directions to the latter court to proceed in accordance with this opinion. All the justices concurring.

NOTE.

Improvements—Agreement to Repair—Bidding Validity of Contract. — An improvement contract is not invalid, as tending to increase the bids of contractors, and thereby impose upon abutting

owners a burden properly resting upon the general public of the city, merely because it contains a stipulation that the contractor shall bear the expense of repairs during a certain period, if such stipulation is in effect a mere guaranty of the quality of the work and materials. Brown *v.* Jenks, 93 Cal. 10; Osburn *v.* Lyons (Iowa), 73 N. W. Rep. 630; Fehler *v.* Gosnell, 99 Ky. 380, 35 S. W. 1125; Verdin *v.* St. Louis (Mo.) 27 S. W. Rep. 447; Schenectady *v.* Trustees of Union, 66 Hun (N. Y.) 179; Boyd *v.* Milwaukee, 92 Wis. 456, 66 N. W. Rep. 606.

LONDON & N. Y. LAND CO.

v.

CITY OF JELLICO.

(*Supreme Court of Tennessee, Oct. 4, 1899.*)

City Councils—Meetings—Notice to Members.*—As a general rule, every member of a municipal council is entitled to reasonable notice of special meetings; and no important action can lawfully be taken at such a meeting, unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting.

Municipal Corporations—Contracts—Estoppel.*—Where a city has received the benefits of an unauthorized street improvement contract, which its council could have authorized, and which, while the work was in progress, the members of the council had knowledge of, but did not repudiate, the city is estopped to deny liability under the contract.

Limitations.—The statute of limitations did not begin to run in favor of the city until the completion of the work.

APPEAL by defendant from Campbell county chancery court. *Affirmed.*

J. E. Johnston and *H. K. Trammell*, for appellant.

E. H. Powers and *Ingersoll & Peyton*, for appellee.

CALDWELL, J. The London & New York Land Company brought this bill against the city of Jellico to recover a certain

*The Leading Authorities Bearing on the Principal Case are Cited in the Opinion.

sum of money for grading one of defendant's streets, under a contract made for that purpose. The chancellor dismissed the bill, but the court of chancery appeals reversed his action, and pronounced a decree in favor of the complainant for $476.86. The principal defense interposed by the city is rested upon the fact that the contract under which the grading was done was made at a special meeting of the board of mayor and aldermen, called without notice to some of the aldermen, and held in their absence. The result of the authorities upon the subject is that, as a general rule, every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can lawfully be taken at such meeting unless such notice has first been given, or unless the members not notified actually attend and participate in the business of the meeting. 1 Dill. Mun. Corp. (4th Ed.) §§ 263, 286; 1 Beach, Pub. Corp. § 271; 15 Am. & Eng. Enc. Law, 1035; Lord *v.* City of Anoka, 36 Minn. 176, 30 N. W. 550; Beaver Creek *v.* Hastings, 52 Mich. 528, 18 N. W. 250; Supervisors *v.* Horton, 75 Iowa, 271, 39 N. W. 394; Poola & F. R. Ry. Co. *v.* Commissioners of Anderson Co., 16 Kan. 302; People *v.* Batchelor, 22 N. Y. 128; Harding *v.* Vandewater, 40 Cal. 77; Stow *v.* Wyse, 7 Conn. 214. The present contract was confessedly subject to this general rule, and, being so, it was undoubtedly invalid, and, nothing else appearing, the complainant would inevitably be repelled from court.

Case Stated.

City Councils—Meetings—Notice to Members.

There is another aspect of the case, however, that demands the consideration of the court. The contract was fair and reasonable in its terms, and was within the scope of the powers conferred upon the council for the improvement of streets. It soon became known to the members of the council, who permitted it to go unrescinded and unchallenged, and allowed the complainant to continue the work through several months to completion, in the belief that all was satisfactory, and with

Municipal Corporations—Contracts—Estoppel.

the unquestionable result of large and permanent advantage to the municipality. Having thus received benefits for which the council might well have contracted in a proper meeting, the city will not now be heard to deny liability therefor. In such a case, liability arises by implication of law, and payment must be made according to the benefits received. The law, which always intends justice, implies a promise. Hitchcock *v.* Galveston, 96 U. S. 341; 1 Dill. Mun. Corp. § 460; San Francisco Gas Co. *v.* City of San Francisco, 9 Cal. 453; Columbus Water-Works Co. *v.* City of Columbus (Kan. Sup.) 48 Pac. 1097; Moore *v.* Mayor, etc., 73 N. Y. 238; Schipper *v.* City of Aurora (Ind. Sup.) 22 N. E. 878; McDonald *v.* Mayor, etc., 23 Am. Rep. 144; Memphis Gas-light Co. *v.* City of Memphis, 93 Tenn. 612, 30 S. W. 25; Dowell *v.* City of Portland, 13 Or. 248, 10 Pac. 308. Since the price named in the invalid contract is shown to be entirely fair and reasonable, not only in view of the labor done, but also in reference to the benefits conferred, it will be taken as the true measure of recovery.

The plea of the statute of limitations must fail, because the work, although commenced more than six years before the filing of the bill, was not completed until a time within that period. Complainant's right of action accrued upon the completion of the work, and the statute began to run at that time, not sooner. The other defenses will be mentioned in oral opinion. None of them are sufficient to defeat the complainant's action. The decree of the court of chancery appeals is affirmed.

Limitations.

PEOPLE *ex rel.* HATHORNE

v.

MORROW *et al.*

(*Supreme Court of Illinois, Oct. 16, 1899.*)

Organization or Annexation—Co-ordinate Jurisdiction.—A certain territory could be either organized into a village, or annexed by a city, and proceedings for such organization were properly instituted by petition to the county judge to submit the question to the voters of the territory, and were pending, when proceeding, regular and proper in form, for the annexation of the territory by a city were commenced by petition to the city council. *Held*, that the annexation proceedings were commenced too late to defeat the jurisdiction conferred by the petition to the county judge.

Appeal by relator from Lake county circuit court. *Affirmed.*

Williams, Holt & Wheeler, for appellant.

Peck, Miller & Starr, for appellees.

WILKIN, J. This is an information in the nature of a *quo warranto*, filed in the circuit court of Lake county by the state's attorney, on the relation of certain parties, against appellees, to oust them of the franchise of president and trustees of the village of North Chicago, on the ground that the village was not legally organized. On issue joined, a trial was had before the court without a jury, resulting in a judgment finding the respondents not guilty, and holding the village organization valid.

It is stipulated by the parties that on April 18, 1895, appellee R. H. Morrow and 42 other residents and legal voters, residing in the territory claimed to have been organized into said village, petitioned the county judge of the county of Lake to cause the question to be submitted whether the voters in that territory would organize the same as a village, under the act of April 10, 1872, and acts amendatory thereof, and that

in pursuance of that petition an election was called for the following 7th day of May, notices of which were duly posted, which election resulted in a vote of 91 for and 5 against organization; and that thereupon the county judge called an election to be held on the 11th day of June following, the returns of which, on the 15th, showed the election of respondents to the offices from which it is sought to oust them by this proceeding. It is expressly stipulated that all the proceedings following the petition of April 18th were regular, and in conformity with the provisions of the statute authorizing the organization of villages (Rev. St. c. 24, art. 11, §§ 1, 6; 1 Starr & C. Ann. St. [2d Ed.] c. 24, pars. 185–190); but it is also agreed that on the 6th of May, 1895 (the day before the election on the question of organizing the village), the requisite number of legal voters in certain of said territory presented a petition to the city council of the city of Waukegan that such territory be annexed to said city, which petition was on the same day allowed, and an ordinance of annexation to that effect regularly adopted. It is also agreed by the parties in this behalf that said last proceeding was in all things regular, and in conformity with the statute providing for the annexation of contiguous territory to any city or incorporated village or town. Rev. St. c. 24, § 195, *supra*. It is conceded that, if this latter proceeding legally took the territory therein described out of that claimed to be organized into the village, the organization must be held invalid.

It is insisted on behalf of respondents below, appellees here, that such annexation proceedings were illegal and void—First, because they were begun after the filing of the petition for an election to organize the village of North Chicago, and while that proceeding was still pending and undetermined; and, second, because there was at the time no law of this state in existence authorizing that proceeding,—that is, authorizing the annexation of contiguous territory to cities and incorporated towns and villages. We regard the second position as without force. There was such a statute, then capable of enforcement. It will not, however, be necessary

to further notice that branch of the argument, since, upon reconsideration of the case, we are of the opinion that the first point is well taken and should be sustained.

As between courts of co-ordinate jurisdiction, the tribunal first acquiring jurisdiction retains it, and is not to be interfered with by another co-ordinate court. The reason of the rule is that otherwise confusion and conflict would arise. Here power is given over the same territory to two parties authorized to act,—one a city council or board of trustees, who may attach it to a municipality to which it is adjacent; the other, a majority of the legal voters within its boundary, who may organize it into a village. In conformity to the foregoing rule is the case of Taylor *v.* City of Ft. Wayne, 47 Ind. 274. There the appellees attempted to attach certain territory to the city of Ft. Wayne under the provisions of section 84 of a certain statute of that state (Laws 1867, p. 107) providing for the annexation of territory adjacent to cities. Another statute authorized the incorporation of towns on the presentation of a petition to the board of county commissioners, and requiring the latter to require certain proof, and make an order declaring that the territory shall, with the assent of the qualified voters thereof, be incorporated, etc. The appellants sought to prevent the annexation by appellees, averring a compliance with all the requirements of the statute in regard to the incorporation of towns, and showing that they had filed their petition before the county board, who had received it in open session and assumed jurisdiction. The city appeared, and resisted the granting of the same, and the board ordered the further consideration of the question postponed until its next regular session. In the decision of the case the court said: "But it is claimed by the appellees that the common council was authorized by the charter to annex the territory, and if it was done in the manner pointed out by the charter, at any time before the town was fully organized, the act of annexation would be valid, and the application to the board of commissioners thus defeated. Under section 84, *supra*, the common councils of cities, are authorized to annex

certain territory to the city. Under the act to organize towns, that same territory may become incorporated as a town, and thus become a municipal government, outside and independent of the city, before it is annexed. The general assembly has authorized both proceedings. As we have seen, after an application has been filed before the commissioners by residents of territory sought to be incorporated, it is the duty of the commissioners to hear the application, and make such orders as the evidence introduced and steps taken by the petitioners entitle them to. The proceedings before the board of commissioners give that body jurisdiction over the subject-matter, and it cannot be defeated by any act of the common council. Having acquired jurisdiction, it is their duty to retain it, and proceed to a final hearing and disposition of the application. West *v.* Morris, 2 Disn. 415; Merrill *v.* Lake, 16 Ohio, 373, 405. It is a clear principle of jurisprudence that, when there exist two tribunals possessing concurrent and complete jurisdiction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted, and which thus acquires jurisdiction of the subject;" citing authorities. In Independent Dist. *v.* Board of Sup'rs, 51 Iowa, 658, 2 N.W. 591, the supreme court of that state say: "By the proceedings taken by the plaintiff it had obtained jurisdiction over the disputed territory before any steps were taken to organize Grant. The right to complete this organization as provided by law followed. It could not be ousted of its jurisdiction over the disputed territory by anything done subsequent to the proceedings to organize the plaintiff, unless the attempted organization was abandoned or was not completed within the time required by law."

The only thing that distinguishes these cases from this is that there the bodies authorized to act exercised judicial functions, though not as courts, whereas, under our statutes and decisions, neither the county judge in giving notice of an election to organize a village, the city council, nor board of trustees upon a petition for annexation of contiguous territory, acts in any other than a ministerial or legislative capacity,

and therefore the rule above cited may be said to not strictly apply. It is, however, under our statute, the imperative duty of the county judge and municipal authorities to act. In fact, they have no discretion or power to determine whether they shall do so; and therefore when, in this case, the county judge performed his duty by receiving the petition and ordering the election, the proceeding to organize was as effectually commenced and pending, to be acted upon by the legal voters, as though he had judicially determined that such notice should be given. The reason of the rule above laid down applies to a case like this with as much force as though the action of the county judge or city council had been strictly judicial, and we are not disposed to attach any importance to the literal definition of term "jurisdiction." It may, we think, be properly used in this case as synonymous with "power" or "authority."

At the time the petition for annexation was presented to the city, there had been begun and was pending a proceeding by the proper authority to perfect the organization of the village. In other words, the territory was in process of organization into a village. That that proceeding might have resulted in a failure to organize does not, in our judgment, militate against this proposition; and the question, therefore, is, could the petitioners for annexation defeat that proceeding by subsequently attempting to call into exercise the other power authorized by the statute? It cannot, we think, be presumed that the legislature intended to give citizens and legal voters of certain territory the power to organize a village, and at the same time authorize other parties, by a subsequent proceeding, to defeat that right; and it is clear that to hold otherwise would be to bring into conflict, resulting in confusion, the two opposing powers, or, speaking in a general sense, jurisdictions. Had the petition for annexation been first presented to the city council, and its action postponed from time to time, until, by a subsequent proceeding, the organization of the territory into a village had been perfected, the same question would be presented, and we do not think in that case

it could reasonably be held that the power of the city council to carry out the annexation proceeding would be defeated. The question, as it arises under our statute and decisions, is a new one, and not wholly free from difficulty, but we think the foregoing views are sustained by both reason and authority. The judgment of the circuit court will be affirmed. Judgment affirmed.

CITY OF SULLIVAN *et al.*

v.

TICHENOR.

(*Supreme Court of Illinois, April, 17, 1899.*)

Streets—Dedication—Acceptance—Presumptions.—Where the acceptance of all of a street as dedicated to the public is admitted, with the exception of a certain strip, and there is nothing to show that the acceptance was limited, and that some part of the offered way was rejected, it must be held that there was an acceptance of the street as dedicated; and the mere fact that the public did not travel over such strip was immaterial in this connection.

Streets—Limitations.*—The statute of limitations does not run against a municipal corporation in respect to property held for public use.

Same—Adverse Possession.*—Length of possession by an abutting owner and nonuser by the municipal authorities of land dedicated as a public street, where there is nothing creating an equitable estoppel against the municipality, cannot confer any title in such land upon the abutter.

APPEAL by defendants from Moultrie county circuit court. *Reversed.*

Ray D. Meeker, *City Atty.*, and *Meeker & Meeker*, for appellants.

J. R. & Walter Eden, for appellee.

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*See Ralston *v.* Town of Weston, 1 Mun. Corp. Cas. 743, and *note*, 764 *et seq.*

City of Sullivan *v.* Tichenor

CARTWRIGHT, J. Appellee owns and resides upon the S. E. ¼ of block 10 in Kellar's addition to the town (now city) of Sullivan. There is a strip of land 6 feet wide and 100 feet long, running east and west, between the south line of said S. E. ¼ of block 10 and an old wooden sidewalk built in Water street. The city provided by ordinance for building a new brick sidewalk on this strip of land along the south side of said block 10, and appellee filed her bill in this case against the city, the mayor, and the members of the council to enjoin the building of the same. By her amended bill she alleged that she and those under whom she claims had been in peaceable possession of said strip of land, and claiming to own the same up to the north line of said old sidewalk, for more than 20 years, and that the city had never owned or been in possession of the same. The city, by its answer, claimed the strip as a part of Water street, by virtue of a dedication to the town of Sullivan, for the benefit of the public, by William Kellar, owner of the land. The issue made was referred to the master in chancery, who took the evidence, and reported that Kellar's addition was platted in 1850; that nothing appeared of record or in evidence showing whether the street was accepted; that defendants had never been in possession of the strip; that complainant and those under whom she claimed had been in possession since 1869, and that she had been in possession since 1880; and that the plat had never been accepted. He concluded that the equities were with complainant. Objections to this report were overruled, and they were filed as exceptions, and again overruled by the court. A decree was entered in accordance with the prayer of the bill.

Case Stated.

William Kellar made a survey and plat of the addition to the town of Sullivan on May 23, 1850, which was acknowledged before a justice of the peace and recorded August 5, 1850. Water street was one of the streets of the town, 60 feet wide, and by this plat it was continued eastward south of said block 10, including 45 feet in width south of said block from the lands of said William Kellar; and the balance

was taken from William Patterson's land, adjoining it on the south. The master found that there was no acceptance of the dedication up to the south line of the block as platted, and that this strip of 6 feet was not accepted. There is no doubt or question that the rest of the street was accepted. The facts upon which this conclusion rested are as follows: Before and at the time when the addition was laid out, there was a public road leading into the town from the east, along the route where the street was laid out, on lands of William Kellar and the adjoining owner on the south, and there was a fence on each side of this road. Kellar's land was brush land, and his fence along the road was a rail fence, about on the line to which complainant now claims, and about 6 feet south of the line of block 10. When the addition was laid out, and before any lots were sold, Kellar took away this fence. The road was the main road into the town, and continued to be in constant and general use. The premises remained in that condition, without any fence or other obstruction or encroachment upon the public right, for several years. We do not think that these facts justify the conclusion that there was no acceptance of the entire street as dedicated. An acceptance of the street as dedicated to the public might be evidenced by user. No formal act or ceremony was necessary to an acceptance, and it was not necessary that there should be any record of such an act by which the public would be invested with the easement. In fact, it is not questioned that there was in this case an acceptance of all the street except this 6 feet; and unless there is something to show that the acceptance was limited, and that some part of the offered way was rejected, it should be deemed an acceptance of the whole as offered. It is true that the public did not travel generally over the strip in question, but there was no hindrance to their doing so, if the occasion required. One who holds possession under a conveyance is taken to be in possession of the whole tract conveyed, and where, as here, the acceptance is not limited, and

Streets—Dedication—Acceptance—Presumptions

the entire premises are open to the public, the acceptance should be taken to include the entire width conveyed by the plat. The circumstances of this case are not the same as in the case of Hewes *v.* Village of Crete, 175 Ill. 348, 51 N. E. 696, where the public authorities refused to accept a part of the premises dedicated, which were in the adverse possession of individuals claiming it as their property. The acceptance in that case was limited, and there was a refusal to accept a portion, and such portion was in fact held adversely to the public. We think the exception to this finding should have been sustained.

The only remaining ground upon which the decree is sought to be sustained is the adverse possession of complainant. A few years after the addition was laid out, purchasers of lots along the street erected a fence on the line where the rail fence had been, encroaching 6 feet upon the street. There was a blacksmith shop in the vicinity where there was no fence, and people drove up to the shop, but it is uncertain from the testimony whether it was on the premises now owned by complainant. At any rate, the fence was maintained by complainant and those under whom she claims from 1869 until it was taken away, eight years before this suit. Complainant's father-in-law moved on the property in 1869, and lived there until his death, in 1882. He deeded the property to her, and she lived there after 1880. The fence was kept up until about eight years ago, when she took it away to let the land lie open to the street, not desiring a fence in front of her property. About the time the fence was first built there was a school house erected about 200 feet east of the property. The old wooden sidewalk was then built along the new fence, either by the property owners or by the school directors, in connection with private donations, and it has since been renewed in the same place. So far as appears, the town or city had nothing to do with the location or building of the sidewalk, and took no action about it until it was proposed to build a new sidewalk on the true line. The question is whether such adverse possession will prevent the

city from claiming the strip. It is well established that the statute of limitations does not run against a municipal corporation, in respect to property held for public use. Piatt Co. *v.* Goodell, 97 Ill. 84; Lee *v.* Town of Mound Station, 118 Ill. 304, 8 N. E. 759; Greenwood *v.* Town of La Salle, 137 Ill. 225, 26 N. E. 1089. Municipal authorities cannot grant a street for any purpose inconsistent with the public use, and, as prescription presupposes a grant, it cannot exist in such a case; and an individual cannot acquire a prescriptive right for any private use. City of Quincy *v.* Jones, 76 Ill. 231; Logan Co. *v.* City of Lincoln, 81 Ill. 156. If complainant could gain no right by prescription or under the statute of limitations, to say that mere possession for any length of time could invest her with right or title to the premises would be to give her the benefit of the statute of limitations under some other name. There would be no substantial difference between saying that she has acquired the premises by adverse possession, and saying that the public has lost them by the same possession. In all the cases to which we have been referred as sustaining the right of one who has trespassed upon a public street to retain the premises so taken, there has been some other element than the mere fact of possession, and the conditions have been such that it was necessary to estop the municipality to prevent injustice and wrong. The doctrine of equitable estoppel may be applied to municipal corporations, where justice and right may require it. Chicago, R. I. & P. R. Co. *v.* City of Joliet, 79 Ill. 25; Chicago & N. W. Ry. Co. *v.* People, 91 Ill. 251; Martel *v.* City of East St. Louis, 94 Ill. 67. A municipal corporation can no more profit by fraud upon property owners than an individual, and may be estopped by conduct. In Jordan *v.* City of Chenoa, 166 Ill. 530, 47 N. E. 191, it was said that the statute of limitations does not run against municipalities holding streets and alleys for the general public; but in that case Jordan had not only been in possession of the alleged alley, but he had a house standing on

Streets—Limitations.

part of it, and the city was held to be estopped from asserting title. There are other cases to the same effect where parties had changed their position, relying upon some act or conduct of the municipality. In this case there is nothing but the naked fact of possession by the complainant, and nonuser for a long time by the public authorities. We do not see any equity in complainant's position. She testified that, when she was told the city was going to build the sidewalk on the proposed line, she told the mayor she was willing, if other people were going to build on the line. She mentioned persons in other places in the town who had encroached on the streets, and she did not want to yield up these premises, unless they yielded what they had taken. She had no improvements on the strip, and there was nothing on it but some rose bushes and a cherry tree. She would suffer no substantial loss by a surrender to the public. The public authorities had nothing to do with the old sidewalk, and did not build it, or locate it where it was built. We do not find anything in the case from which an equitable estoppel would result. As complainant could acquire no prescriptive right in the property held in trust for the public use, we must conclude that the decree was wrong. The decree is reversed, and the cause is remanded to the circuit court, with directions to dismiss the bill. Reversed and remanded.

Same—Adverse Possession.

STATE (TOMLIN, PROSECUTOR)

v.

CITY OF CAPE MAY *et al.*

(*Supreme Court of New Jersey, Aug. 11, 1899.*)

Authority to Regulate Use of Streets by Hucksters.*—The council of the city of Cape May has the right by ordinance to regulate the use of the streets thereof by hucksters and other vendors, and

*See notes at end of case.

State (Tomlin, Prosecutor) *v.* City of Cape May

to restrict the same in the use thereof to certain streets, and certain portions thereof, for the preservation of the peace and health of the city, and the proper use by the public of the streets. This power is conferred by sections 19 and 20 of the city charter (P. L. 1875, p. 206).

Penalties—Validity of Ordinance.—Where the statute authorizes the common council of a city to enact ordinances, and to provide penalties for the violation thereof, by a fine not exceeding a certain sum, or imprisonment not exceeding a certain period, the specific fine and the specific imprisonment must be fixed by the council in such ordinance; and this power or discretion cannot be delegated to the magistrate or court before whom proceedings are taken to punish summarily the offender for a violation of such ordinance.

Same—Delegation of Power.*—An ordinance without an appropriate and legal penalty is nugatory. It is the legal sanction of a penalty for its violation which gives to an ordinance vitality.

(Syllabus by the Court.)

CERTIORARI by the state to review an ordinance.

Argued November term, 1898, before DEPUE, VAN SYCKEL, and LIPPINCOTT, JJ.

Morgan Hand, for prosecutor.

D. J. Pancoast and *J. Spicer Leaming*, for defendants.

LIPPINCOTT, J. The writ of *certiorari* in this case removes into this court for review the second and third sections of an ordinance of the city of Cape May entitled "An ordinance establishing and regulating hack and market stands in the city of Cape May, New Jersey." Section 1 of this ordinance designates the places in the public streets of the city where carriages or vehicles to be used as public hacks for the conveyances of passengers shall take their stand. This section of the ordinance is only incidentally involved in the determination of this case. Section 2 of this ordinance provides: "And be it further ordained and enacted that all persons exposing for sale the usual articles of farming and farm produce from wagons, carts, vehicles, or otherwise than at their regular place of business shall

Case Stated.

*See notes at end of case.

take their stand on Mansion street between Perry and Jackson streets, and on Jackson street from Washington street to Cape Island bridge, and shall remain on said stand each and every day when exposing said articles for sale, until nine o'clock a. m." Section 3 provides: "And be it further ordained and enacted that any person or persons violating the foregoing provisions of this ordinance, shall be subject to a fine of five dollars. It shall be the duty of the marshal and police officers to make complaint before the mayor or aldermen, and shall issue his warrant against said offender or offenders, and bring him, her, or them before said mayor or aldermen, when upon a summary hearing of the matter the said mayor or aldermen, shall, if the party or parties are adjudged guilty, impose the aforesaid fine upon him, her, them, or each of them, together with cost, and if said fine and cost are not immediately paid, shall have power to commit said offender or offenders to the city or county jail for a period not exceeding ten days."

The defendants insist that this writ should be dismissed on the ground that the prosecutor is not injuriously affected by the ordinance in question, and is not entitled to the writ until proceedings shall have been taken against him for the violation of the ordinance. The proof shows that he is a huckster, having no place of business in the city of Cape May, and is daily engaged in selling farm produce from his wagon through the streets of the city, and that he, in his said business, is directly affected by the ordinance, in that he is prevented from selling from his wagons as he chooses, at such hours as he chooses, and is compelled to take his stand at the places designated during certain hours of the day. The proof also shows that the prosecutor has had on several occasions proceedings against him under this ordinance for its violation. Under this proof, the prosecutor is a person who is directly affected by the second and third sections of this ordinance. The effect upon him of this ordinance is to prevent him from carrying on the business of selling farm produce from his wagon in the streets of Cape May, except

he takes his stand at the designated places, where he must remain until 9 o'clock a. m. This ordinance may be deemed as prohibitive, after the hour named, of any act of selling from his wagon at any other places at, in, or along any of the streets of the city. I think that there can be no question but that this situation gives him the interest required to object to the ordinance, without the necessity of waiting until legal proceedings be taken against him, or until judgment be against him, and he either be subjected to fine or imprisonment. He is actually engaged in a business which the ordinance specifically prohibits, and it affects directly his person and his acts of the business in which he is engaged; for the ordinance provides for the issuance of a warrant in the first instance against his person, and thus immediately prevents him from engaging in his business. The case, therefore, is not within the decision of Hamblet *v.* City of Asbury Park, 61 N. J. Law, 502, 39 Atl. 1022, where the prosecutor was one who merely apprehended that, if he engaged in a certain calling, it would be violative of the ordinance; and the question in that case was whether the apprehension merely gave the right to the prosecutor to attack the ordinance in advance of any action taken against him for the enforcement of its penalties. The ordinance in that case was one imposing a license fee for the exercise of a vocation, and involved the question of whether, as a taxing scheme, it was valid. The ordinance was one which imposed a penalty for the nonpayment of a license fee, rather than prohibitive of any act of the prosecutor.

The second section of this ordinance, with appropriate penalties for its violation, under the charter of the city, would seem to be a reasonable exercise of the police power; for it is well established that the city authorities of a municipality have the clear legal right to regulate the use of the streets by hucksters and other vendors, and to designate market stands, and of limiting the use of the streets to certain hours of the day, and imposing other restrictions for the preservation of

Authority to Regulate Use of Streets by Hucksters.

the peace and health of the public, and the proper and legal use of the streets by the public. 1 Dill. Mun. Corp. (4th Ed.) §§ 387–390, and cases cited. This power exists under the charter of the city of Cape May (P. L. 1875, p. 206, §§ 19, 20). At the same time, the questions whether this ordinance is unduly indefinite and vague as to the hours wherein the right must be exercised, and the situation after the expiration of that period, and whether the space allotted under the evidence is sufficient, and whether by its terms the ordinance is not an unnecessary restriction of the prosecutor's business, are questions which are worthy of consideration, but which are not decided. McConvill *v.* Mayor, etc., of Jersey City, 39 N. J. Law, 38.

It is concluded that the whole ordinance must fail, as devoid of any binding force whatever, because of the entire illegality of the penalities attempted to be imposed by the third section of the ordinance. An ordinance without a penalty for its violation is nugatory. It is an appropriate and legal sanction which gives vitality and force to the ordinance and renders the prohibited act unlawful, and without this sanction no proceedings under it for its enforcement could have any vitality, and the ordinance itself is a nullity. State *v.* Zeigler, 32 N. J. Law, 262, 268; Smith *v.* Town of Clinton, 53 N. J. Law, 329, 21 Atl. 304; State *v.* Cleaveland, 3 R. I. 117; 1 Dill. Mun. Corp. (4th Ed.) p. 410, §§ 308, 336, 338; Smith *v.* Gouldy, 58 N. J. Law, 562, 34 Atl. 748; Massinger *v.* City of Millville (N. J. Sup.) 43 Atl. 443.

Under sections 19 and 20 of the city charter of the city of Cape May (P. L. 1875, p. 206), the city council has the power to enact ordinances of this character; and by section 21 it is provided "that in all cases where, by the provisions of this act, the city council have authority to pass ordinances on any subject, they may prescribe penalty or penalties for the violation thereof, either by imprisonment in the city or county jail, not exceeding thirty days, or by fine, not exceeding one hun-

Penalties—Validity of Ordinance.

dred dollars." It will be seen that the city council only are authorized to prescribe the penalty. The penalty to be prescribed is either imprisonment in the county jail, or a fine not exceeding a certain maximum. These penalties are in the alternative, and the council was not authorized to impose both for the same act of violation. One or the other must be distinctly prescribed, either fine or imprisonment. If a fine, then the precise sum must be fixed. If imprisonment, then the precise term stated, and the discretion to fix either must be exercised by the council. It could not be delegated to the magistrate before whom the proceedings for the violation of the ordinance were taken. The statute gave to the council the power to fix the penalties, within certain bounds, and that power could not be delegated to the magistrate. The legislation clearly evinces this intent, and the governing body was bound to fix the precise penalty desired. They could not confer discretion in this respect upon the magistrate, even though they fixed its range within lesser bounds than the maximum penalties which they could establish under the provisions of the city charter. Young & M. Amusement Co. *v.* Atlantic City, 60 N. J. Law, 125, 37 Atl. 444; The Philadelphia & B. R. Co. *v.* Borough of Brigantine, 60 N. J. Law, 127, 37 Atl. 437. The fine must be distinctly and precisely ascertained before proceedings are taken before the magistrate, and so must the term of imprisonment, if imprisonment be imposed. *Id.* It will be perceived that this ordinance does not conform to the city charter or the general principles of law in fixing the penalties for its violation. In so far as a fine is concerned, the ordinance is legal, but it adds to the fine an imprisonment not exceeding ten days, "if the fine be not immediately paid," and it will be noticed that this imposition of the penalty of imprisonment is not in default of the payment of the fine, or until payment be made. but absolute in its terms "if the fine be not immediately paid." A momentary inability to pay the "fine and costs" might result, in the discretion of the magistrate, in absolute imprisonment for the term fixed. Besides, the imprison-

Notes

ment is left to the discretion of the magistrate,—to be 1 or 10 days if the fine of $5 was not at once paid. The penal section of this ordinance was without statutory authority, and cannot be upheld upon general principles. White *v.* Tallman, 26 N. J. Law, 67; State *v.* Zeigler, 32 N. J. Law, 262. The power to commit to imprisonment where a fine is authorized to be imposed under the ordinance can only be until the fine and costs adjudged are paid, and not by way of punishment of the offender for the offense committed. Mayor of Bayonne *v.* Herdt, 40 N. J. Law, 264; Brieswick *v.* Mayor, etc., of Brunswick, 51 Ga. 639; Canouse *v.* Lexington, 2 Ill. App. 318. The conclusion reached is that the ordinance is set aside, with costs.

Same—Delegation of Power.

NOTES.

Power of Municipality to Regulate Trade to Prevent Public Inconvenience.—In Mitchel *v.* Reynolds, 2 P. Wms. 181, LORD MACCLESFIELD, in delivering the opinion, said: "All by-laws made to cramp trade in general, are void. By-laws made to restrain trade, in order to the better government of it, are good in some cases, *viz.*: if they are for the benefit of the place, and to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity." See also 3 Ala. 137, 36 Am. Dec. 441; Fugakerly *v.* Wellshm, 1 Stra. 463; King *v.* The Chamberlain of London, 3 Burr. 1322; Wannel *v.* Chamberlain of the City of London, 1 Stra. 675; Pierce *v.* Bartrum, Cowp. 269; The Master Wardens, etc. *v.* Fell, Willes, 384.

Power of Municipality to Prevent Hucksters from Selling on Streets.—A municipal ordinance prohibiting the selling of marketable articles elsewhere than in the public market is a valid exercise of the police power, and not in restraint of trade. Skelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143; Blanchard *v.* Ivers (Fla.), 24 So. Rep. 66; City of Jacksonville *et al. v.* Ledwith (Fla.), 32 Am. & Eng. Corp. Cas. 382; LeClaire *v.* Davenport, 13 Iowa 210; Bowling Green *v.* Carson, 10 Bush. (Ky.) 64; State *v.* Davidson, 50 La. Ann., 24 So. Rep. 324; St. Louis *v.* Webber, 44 Mo, 547; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Winsboro *v.* Smart, 11 Rich. (S.

Car.) 551. To prevent obstruction to travel and general inconvenience, a municipality may forbid public selling in the streets. Com. *v.* Elliott, 121 Mass. 367; *In re* Nightingale, 11 Pick. (Mass.) 168.

Authority to Prevent Obstruction of Streets by Hucksters.—A city, under its authority to prevent the obstructing of the streets with vehicles, may enact an ordinance that no person offering goods for sale shall permit his vehicle to stand on any of the adjoining streets within 500 feet of the market. People *v.* Keir (Mich.), 27 Am. & Eng. Corp. Cas. 634.

Nuisances—Hawking in Street.—An ordinance restraining hawkers and peddlers from using the streets for the purpose of traffic may be valid as an exercise of the power to prevent nuisances. Caldwell *v.* Alton, 33 Ill. 416, 85 Am. Dec. 282; McDonald *v.* Newark, 42 N. J. Eq. 136.

But it has been held that the power to regulate and control peddling, does include authority to prohibit hawking in a certain part of the city, where it is not claimed that such prohibition is to prevent the creation of a nuisance. Toronto *v.* Virgo (Eng.), 73 Law T. Rep. 492.

Legislative Powers of Municipalities Cannot be Delegated.—See *note*, 1 Mun. Corp. Cas. 252.

JACKSON

v.

CITY OF LANSING.

(*Supreme Court of Michigan, Sept. 19, 1899.*)

Defective Sidewalk—Personal Injuries—Care Required of City.*—A municipality is only required to keep its sidewalks in a reasonably safe condition; and there can be no recovery against it for personal injuries resulting from a fall caused by a depression in a cement sidewalk, about two feet in area, the sides of which, except one, were not abrupt, but sloped towards its center, which was from 1½ to 3 inches below the level of the walk, although the defect, which was caused by the breaking out at the top of the hard crust of the cement and the wear of the grouting beneath, was of many months' standing at the time of the accident.

*See Young *v.* City of Webb City, *ante* 500, and *foot-note*.

Jackson *v.* City of Lansing

ERROR by plaintiff to Ingham county circuit court. *Affirmed.*

R. A. Montgomery and *Dean & Hooker*, for appellant.
Charles B. Collingwood, for appellee.

LONG, J. This action was brought to recover for injuries sustained by plaintiff occasioned by stepping into a depression or hole in a cement sidewalk on the main street in said city. The facts stipulated on the trial were that plaintiff was 60 years of age, and that while walking upon the sidewalk on Washington avenue, the principal business street of said city, where the travel was greatest, and while she was in the exercise of due care and caution, she fell and was injured by stepping into a hole in the artificial stone walk, the hole being caused by the breaking out of the top cement and the wear of the grouting beneath, whereby an irregular hole or depression was formed, not, however, going through the grouting; that this hole or depression was 1½ to 2 feet in area; that the sides, except on the south, were not abrupt, but sloped toward a center, which was from 1½ to 3 inches deep or below the level of the walk; that on the south side the whole was abrupt, with a depth of about 1½ inches, the edge of the block or square of artificial stone walk forming the edge of the hole or depression; that through such fall plaintiff suffered severe bodily injury, to her damage, etc.; that said defect in the walk was of many months' standing, and one which had been noticed by several parties long previous to the accident. The court below directed the verdict in favor of defendant. Plaintiff brings error. This instruction is assigned as error.

It has many times been held that municipalities are not required to keep such walks in perfectly safe condition. They are liable only when the walks are not reasonably safe. This entire defect was caused by the breaking out at the top hard crust and the wear of the grouting beneath. The defect was not one which rendered the walk not reasonably safe, within the meaning of the statute. In Weisse *v.* City of

Detroit, 105 Mich. 484, 63 N. W. 423, it appeared that there was a rise in the walk from 1½ to 2 inches in height against which plaintiff stumbled, and it was held that the walk was reasonably safe, within the meaning of the act. So, in Yotter *v.* City of Detroit, 107 Mich. 4, 64 N. W. 743, there was an abrupt rise of two inches, occasioned by planks being laid lengthwise, and the same rule was applied. In Shietart *v.* City of Detroit, 108 Mich. 309, 66 N. W. 221, the defect complained of was leaving an abrupt end of a sidewalk without the continuance of the walk beyond that point, and it was this end of walk that occasioned the injury. It was a few inches above the level of the ground. MR. JUSTICE HOOKER, in a concurring opinion in that case, said: "It was perfectly safe to all except the heedless, and the public should not be required to make walks so smooth that people cannot stub their toes upon them. Sidewalks in many places require steps, single or in flights, and crosswalks are often upon a different level from the sidewalks which they join. Manholes for sewers must have covers which are above the level of the pavement. Wooden sidewalks become uneven by wear, and must be repaired by planks thicker than the half-worn planks which they adjoin, and flagstones are thrown out of level by the freezing of the ground. In all such cases, where the defect is obvious, the circumstances must be exceptional to authorize a recovery." So, it may also be said that cement sidewalks may, by freezing and thawing, become broken, or, by constant travel, may wear through the outer crust and into the grouting. It would then be no greater obstacle to reasonably safe travel than the rise in the walks in the cases cited. We think, under the stipulated facts, the court was not in error in directing the verdict for defendant. The judgment will be affirmed.

HOOKER, J., did not sit. The other justices concurred.

MOFFATT

v.

KENNEY *et al.*

(*Supreme Judicial Court of Massachusetts, Oct. 15, 1899.*)

Streets—Dedication—Acceptance—Condition of Private Streets—Liability of City.*—Since the enactment of St. 1846 of Massachusetts, c. 203, there can be no public street by dedication without an acceptance of it by the public authorities; and to constitute an effectual acceptance there must be a laying out of the street in the ordinary mode prescribed by the statutes; and a city is not liable for personal injuries resulting from the unsafe condition of a private street.

Permissive Use of Private Street—Public Ways—Prescription.*—Abutting owners agreed among themselves that the public should be permitted to use a private street until it should be accepted as a street by the public authorities. *Held*, that use of the street by the public under such permission could not constitute it a public way by prescription.

Same—Personal Injuries—Liability of Licensors.—Such abutting owners could not be held liable for personal injuries sustained by one of the public while using such street under such permission, and resulting from its unsafe condition, caused by their mere failure to use ordinary care for the safety of the public; and the fact that its unsafe condition was not easily discoverable was immaterial in this connection.

REPORT from Suffolk county supreme judicial court. *Verdict for defendant to stand.*

C. W. Bartlett and *J. D. Colt*, for plaintiff.

E. R. Champlin and *G. L. Wilson*, for defendants.

KNOWLTON, J. The place where the plaintiff fell was not a public way for whose condition the city of Boston was

*See notes at end of case.

responsible. In this commonwealth there can be no public way by dedication without an acceptance of it by the public authorities. Before the enactment of St. 1846, c. 203, such an acceptance could be shown either by a vote to accept or by circumstances giving rise to a strong implication, such as frequent and long-continued use by the public, and repairing, lighting, or other significant acts of persons authorized to represent the city or town in that behalf. Hemphill *v.* City of Boston, 8 Cush. 195. While public use may be important as evidence, it is not, of itself, sufficient to show such an acceptance. Since the enactment of the statute above referred to, there can be no effectual acceptance without a laying out of a way in the ordinary mode prescribed by the statutes. Pub. St. c. 49, § 94; Hobbs *v.* Inhabitants of Lowell, 19 Pick. 405; Bowers *v.* Manufacturing Co., 4 Cush. 332; Morse *v.* Stocker, 1 Allen, 150; Hayden *v.* Stone, 112 Mass. 346; Guild *v.* Shedd, 150 Mass. 255, 22 N. E. 896. In the present case there is no evidence tending to show an acceptance, except the evidence of public use, and that alone will not warrant a finding that the street is a public way by dedication. There is no evidence that it is a public way by prescription. Durgin *v.* City of Lowell, 3 Allen, 398; Sprow *v.* Railroad Co., 163 Mass. 330, 39 N. E. 1024. By the indenture of April, 1828, the owners covenanted that the land now known as "Byron Street" should be forever "reserved and kept open" for a public street, "and ceded to the city government as such whenever they will accept the same." This was an agreement among the landowners that the public should be permitted to use it until it should be accepted as a street by the public authorities. The public authorities never accepted it. The evidence tends to show that in 1838 the public began to use it under this license, and continued their use up to the time of the accident. In the absence of evidence to show the contrary, it must be assumed that this use, which began under a license, has continued to be

Streets—Dedication—Acceptance—Condition of Private Streets—Liability of City.

Permissive Use of Private Street—Public Ways—Prescription.

permissive. There is no evidence that it was ever under a claim of right. An adverse right to an easement cannot grow out of a mere permissive enjoyment. Bachelder *v.* Wakefield, 8 Cush. 243, and cases cited. There is no evidence that the plaintiff was using the way by invitation. She was walking there, as one of the public, under a license, and had the ordinary rights of a licensee. There is a class of cases where one is upon private land without an invitation, but by permission, and for his own convenience, in which there is a representation, express or implied, that constitutes an inducement to a licensee, and creates a duty on the part of the landowner to use due care to have the place as represented. For illustration: If one passing over land as a mere licensee, for his own purposes, should be told by the owner that he would find a certain course safe and convenient, and should walk there, the representation of the owner would impose upon him a duty to use reasonable care to have the place safe for the person acting on his statement; or, if he should represent a way across his land to be a public street, his representation would be equivalent to a statement that the place was safe and convenient for travelers, and it would be his duty towards one induced to use it by his representation to keep it as safe as if it were a public street. See Plummer *v.* Dill, 156 Mass. 426–430, 31 N. E. 125; Sweeny *v.* Railroad Co., 10 Allen, 368; Holmes *v.* Drew, 151 Mass. 578, 25 N. E. 22; Murphy *v.* Railroad Co., 133 Mass. 121; Hanks *v.* Railroad Co., 147 Mass. 495, 18 N. E. 218. This is not such a case. The way was doubtless opened for the benefit of the owners and occupants of the adjacent lands, and it has never become a public street. The presumption is that it was maintained for the use of these occupants and such other persons as had occasion to visit them, and that the use of it by the public was merely permissive. Bowers *v.* Manufacturing Co., 4 Cush. 332; Durgin *v.* City of Lowell, 3 Allen, 398; Sprow *v.* Railroad Co., 163 Mass. 330, 39 N. E. 1024; Stevens *v.* Nichols, 155

Mass. 472, 29 N. E. 1150; Pearson *v.* Allen, 151 Mass. 79–82, 23 N. E. 731. Moreover, for 30 years before the accident there had been a representation posted at the entrance to the way from the street that it was a private way, and was dangerous. This negatived any possible inference that it was a public way, and there is no implied representation by the landowners that the public could go there otherwise than as licensees using a way constructed and maintained for private persons. It is a general rule that a licensee going upon land of another must take the land as he finds it. Of course, the landowner is liable if he does him intentional injury, or wantonly or recklessly exposes him to danger. It has sometimes been said that he is liable for a trap upon his land. We are not aware of any decision which distinctly defines the word "trap" in this use. It would, at least, include any very dangerous construction or condition designedly arranged to do injury. But we are of opinion that an owner is under no liability for an unsafe condition of his premises, caused by a mere failure to use ordinary care for the safety of persons who may chance to go there by permission, while he is using the place for his own proper purposes, and is not intending needlessly to expose others to danger; otherwise, there would be no important distinction between his duty to licensees and his duty to invited persons. Certainly the mere fact that a particular danger, resulting from a lack of care, is not easily discoverable, ought not to create a liability on the ground that there is a trap. In most cases of accident the danger is not known until the injury is received, and often it is from an unseen cause. If there is mere inadvertence or carelessness in doing one's work, there is no good reason why, in determining whether there is a liability for it, one principle should be applied if the resulting danger is small, and a different principle if it is very great. The case of Redigan *v.* Railroad Co., 155 Mass. 44, 28 N. E. 1133, is decisive of the case at bar. In that case the plaintiff was walking, in the evening, along a platform of the defendant's station building, in a

Same—Personal Injuries—Liability of Licensors.

place where the public were permitted to walk, and where she supposed it was safe to walk, and fell through a trap door which had been left for an hour open and unguarded. It was held that there was no evidence of negligence on the part of the defendant. In that case, as in this, there was nothing to indicate to the plaintiff at the time of the accident that the way was unsafe. In this case, as in that, a careful observer might have noticed that the surface of the way was arranged to be taken up, and that there was a possibility of disarrangement in opening and replacing it. Reardon *v.* Thompson, 149 Mass. 267, 21 N. E. 369, is a case in which the plaintiff fell into an open hole in the ground, concealed by the darkness of the night. In neither of these cases was there such a trap as to create a liability on the part of the owner of the premises, who permitted the plaintiff to walk there. Verdict to stand.

NOTES.

Dedication of Streets — Acceptance — Statutory Requirements.— "Where a certain method is prescribed by statute, by which alone a road or street may be accepted and be established as a public highway, user of such road or street, or repairing by the public authorities, or any indirect recognition is not alone sufficient to make an acceptance binding on the public, but the terms and conditions of the statute must be substantially complied with." 9 Am. & Eng. Enc. of Law (2d Ed.), 52.

Municipality Only Bound to Keep Streets in Repair Which it Has Recognized as Such.—When a municipality has by its unequivocal acts recognized a portion of ground within its limits as a public street, it is bound to keep the same in repair, and will be held liable for a failure to perform this duty, even though the street has never been regularly laid out or dedicated. But where there has been no such recognition, the municipality is not required to keep such land in a proper condition for travel. Conrad *v.* Ithaca, 16 N. Y. 158; Weet *v.* Brockport, 16 N. Y. 161; Wyett *v.* Rondout, 44 Barb. (N. Y.) 385; Coates *v.* Canaan, 51 Vt. 131; Kittredge *v.* Milwaukee, 26 Wisc. 46; Weisenberger *v.* Appleton, 26 Wisc. 56; Harper *v.* Milwaukee, 30 Wisc. 365; Colly *v.* Beaverdam, 34 Wisc. 285; Prideaux *v.* Mineral Pt., 43 Wisc. 513; Seward *v.* Milford, 21 Wisc. 485; Mathews *v.* Baraboo, 39 Wisc. 674; Kelly *v.* Fond du Lac, 31 Wisc.

179; Bishop *v.* Centralia, 49 Wisc. 609; James *v.* Portage, 48 Wisc. 677; Aurora *v.* Colshire, 55 Md. 484; Phelps *v.* Mankato, 23 Minn. 277; Manderschid *v.* Dubuque, 25 Iowa 108; Stark *v.* Lancaster, 57 N. H. 88; Sewell *v.* Cohoes, 75 N. Y. 45; Cartwright *v.* Belmont, 2 Am. & Eng. Corp. Cas. 603; Potter *v.* Castleton, 53 Vt. 435; Burr *v.* Plymouth, 48 Conn. 460; Lafayette *v.* Larson, 73 Ind. 367; Bradbury *v.* Benton, 69 Me. 194; Aston *v.* Newton, 134 Mass. 507.

Streets—Prescription—Permissive Use.—Land cannot become a public street by prescription from mere user, where the use is not under claim of right, but only permissive. Steele *v.* Sullivan, 70 Ala. 589; Howard *v.* State, 47 Ark. 431; Eureka *v.* Croghan, 81 Cal. 524; Ely *v.* Parsons, 55 Conn. 83; Green *v.* Bethea, 30 Ga. 896; Illinois Ins. Co. *v.* Littlefield, 67 Ill. 368; Shellhouse *v.* State, 110 Ind. 109; State *v.* Green, 41 Iowa 693; Stewart *v.* Fink, 94 N. Car. 487, 55 Am. Rep. 619; Ruland *v.* South Newmarket, 59 N. H. 291; White *v.* Wiley, 59 Hun (N. Y.) 618; Sherman *v.* Kane, 86 N. Y. 57; Turnpike Co. *v.* Piper, 77 Pa. St. 432; Childs *v.* Nelson, 69 Wis. 125.

SACHS

v.

CITY OF SIOUX CITY.

(*Supreme Court of Iowa, Oct. 10, 1899.*)

Defective Streets—Personal Injuries—Failure to Give Notice—Death—Right of Action.—Where the right of action against a municipality for personal injuries caused by its failure to keep its "streets or sidewalks" in a safe condition was lost by the failure to serve upon the municipality the notice required by the statute of Iowa as a condition precedent to a right of action for such injuries, a death resulting from the injuries does not create a new cause of action under the statute of Iowa providing that "all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same."

Bridge as Part of Street.*—The statute requiring such notice is applicable where the injuries are caused by a defect in a bridge over a stream crossing a street; as the word "streets" in such statute should be given its general rather than its restricted meaning; and under a statute of Iowa the word "highway" includes "public bridges."

*See notes at end of case.

Sachs *v.* City of Sioux City

APPEAL by plaintiff from Woodbury county district court. *Affirmed.*

Argo & McDuffie and *Kennedy, Jackson & Kennedy*, for appellant.

A. H. Burton, F. E. Gill, City Atty., and *T. F. Bevington*, for appellee.

LADD, J. Sachs lived more than three months after receiving his injuries, and no notice whatever was served on the city within that time. The law, as it then stood, read, "In all cases of personal injuries resulting from defective streets or sidewalks, or from any cause originating in the neglect or failure of any municipal corporation or its officers to perform their duties in constructing or maintaining streets or sidewalks, no suit shall be brought against the corporation after three months from the date of the injury, unless written notice specifying the place and circumstances of the injury shall have been served upon such municipal corporation within sixty days after the injury." Chapter 25, Acts 22d Gen. Assem., as amended by chapter 63, Acts 26th Gen. Assem. Had Sachs lived, his cause of action would have been barred by this statute. Starling *v.* Incorporated Town of Bedford (Iowa) 62 N. W. 674. Reed *v.* City of Muscatine, 104 Iowa, 183, 73 N. W. 579. Unless, then, a new cause of action, in event of a wrongful death, is created by section 3443 of the Code, there can be no recovery. That provides, "All causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same." In other words, the cause of action no longer dies with the party injured, as at common law, but passes to the administrator, as assets of the estate. It does not spring into existence from death, but, having a previous existence, does not perish with him who was entitled to maintain an action thereon. Sherman *v.* Stage Co., 24 Iowa, 542; Conners *v.* Railway Co., 71 Iowa, 490, 32 N. W. 465; Dwyer *v.* Railway Co., 84 Iowa, 479, 51 N. W. 244; Worden *v.* Railway Co., 72 Iowa, 204, 33 N. W. 629; Kellow *v.* Rail-

Case Stated.

way Co., 68 Iowa, 480, 23 N. W. 740, and 27 N. W. 466. See, also, Taylor *v.* Inhabitants of Woburn, 130 Mass. 494.

Defective Streets—Personal Injuries—Failure to Give Notice—Death—Right of Action.

As Sachs had lost his cause of action by failing to give the required notice, there was nothing to survive, and on which the administratrix could base a suit. The ruling in Maylone *v.* City of St. Paul (Minn.) 42 N. W. 88, rests on the wording of the charter of the defendant city, which required notice "that the person injured will claim damages of the city for such injury" to be served, and also on statutes by which the cause of action, in event of wrongful death, is expressly given the personal representative. It will be observed that our statute does not limit the necessity of notice to claims by the injured party. The point has not been decided in Wisconsin, though in McKeigue *v.* City of Janesville, 31 N. W. 298, it was intimated that, had deceased lived out the time within which notice should have been served, the action would have been barred; while in the earlier case of Parish *v.* Town of Eden (Wis.) 22 N. W. 399, the view entertained by the supreme court of Minnesota finds approval. The statute of that state seems to be construed as creating a new cause of action. Topping *v.* Town of St. Lawrence (Wis.) 57 N. W. 365; McKeigue *v.* City of Janesville, *supra*. The necessity of notice in such a case results from the decisions that the action of the personal representative is based, not on an independent cause of action, as in Minnesota and Wisconsin, but on one existing in favor of the deceased at the time of his death.

2. But it is contended that the section requiring the service of notice has no application where the injury originated in the neglect of the municipality to properly construct or maintain a bridge. In other words, the appellant asserts that this bridge was no part of the street, and for that reason no notice was required. Paragraph 5 of section 45 of the Code of 1873 reads: "The words 'highway' and 'road' include public bridges and may be held equivalent to the words 'county way,' 'county road,' 'common road,' and 'state road' "; and section 1001:

Bridge as Part of Street.

"Bridges erected or maintained by the public constitute parts of the highway." It will be observed that "street" is not specifically mentioned, and it is said that by implication it is excluded. But "highway" is the broader term. All streets are highways, but not all highways are streets. Tucker *v.* Conrad, 103 Ind. 355, 2 N. E. 803; Penny Pot Landing *v.* City of Philadelphia, 16 Pa. St. 79; Benedict *v.* Goit, 3 Barb. 459; 24 Am. & Eng. Enc. Law, 3. JUDGE ELLIOTT, in his work on Roads and Streets (page 12), says: "A street is a road or public way in a city, town, or village. As the way is common and free to all the people, it is a highway; and it is proper to affirm that all streets are highways, although not all highways are streets. * * * 'Street' is a generic term, and includes all urban ways which can be, and are generally, used for ordinary purposes of travel. * * * It is, in the strictest sense, a highway free to all, and maintained, not for private gain, but public benefit." "Street" is defined by Webster as "originally a paved way or road; a public highway; a thoroughfare in a city or village"; and in the Century Dictionary as "a paved road; a highway; (2) a public way or road, whether paved or unpaved, in a village, town, or city, ordinarily including a sidewalk or sidewalks and a roadway"; and in Bouvier's Law Dictionary as "a public thoroughfare or highway in a city or village." The essential difference is in the location and the manner of improvement. Huddleston *v.* City of Eugene (Or.) 55 Pac. 868. See 2 Dill. Mun. Corp. (4th Ed.) § 688. As "highway" is the broader term, it would seem it would be held to include streets, and, if so, that a bridge must be construed, under these statutes, as a part of the street. In the absence of statute, bridges have been uniformly adjudged a part of the highway. Washer *v.* Bullit Co., 110 U. S. 558, 4 Sup. Ct. 249; cases collected in note to 4 Am. & Eng. Enc. Law (2d Ed.) 920. And when over a stream crossing a street in a city, they are a part of the street. Beaver *v.* City of Manchester, 26 Law J. Q. B. 311; City of Eudora *v.* Miller, 30 Kan. 494, 2 Pac. 685; Mcdonald *v.* City of Ashland, 78

Wis. 251, 47 N. W. 434; City of Chicago v. Powers, 42 Ill. 169. In the last case the court said, through WALKER, C. J.: "It seems to us to be obvious that a bridge over a stream crossing a street is a part of the street. It is as much so as the cover placed over a drain or a sewer crossing a street. Persons travel over it as they do over other portions of a street,—subject, it may be, to any delay that may be occasioned in opening and closing a draw." In common parlance a street of a city includes the necessary bridges, and we are of opinion that bridges are included in the term "streets," as used in the act requiring notice. The appellant ingeniously argues that, as "streets" and "sidewalks" are both mentioned, "streets" must have been in a restricted sense. It may be conceded that enumeration where generalization would have served as well has the effect of limiting the meaning of the words used. But a sidewalk may quite as appropriately extend across a bridge as along the surface of the ground, and is quite as common in the one place as the other. In using the word "sidewalks" then, the bridge may necessarily have been included, rather than excluded, as a part of the street. It may be that, where both "streets" and "bridges" are mentioned in the same statute, the former should not be construed to include the latter. This was held in City of Cedar Rapids *v.* Cedar Rapids & M. C. Ry. Co., 79 N. W. 125, where we said: "It is true that for certain purposes, as for travel, bridges are made a part of the streets, avenues, and highways; but throughout the statute and in this ordinance, and in common acceptation, they are recognized as different from that part of the streets, avenues and highways which are made directly upon the earth's surface." The statute referred to was section 870 of the Code. But there is no apparent reason for saying that in these acts, relating solely to the remedy, such a restricted meaning should be given to the term. The evident design of requiring notice was to enable the municipality to investigate the facts concerning any injury while fresh in mind, and there is precisely the same necessity for so doing whether the injury happened on the sur-

face of the earth, or on that part of the street called a "bridge." The mischief intended to be remedied is the same, and the word "streets," in the act, should be given its general, rather than its restricted, meaning. Affirmed.

NOTES.

Injuries from Defective Bridges—Liability of Municipalities.—Bridges within municipal limits are generally considered as being so far a part of the highway that the municipality is responsible for an injury occasioned by a failure on its part to keep them in repair. Burritt *v.* New Haven, 42 Conn. 174; Commonwealth *v.* Deerfield, 6 Allen, 449; State *v.* Gorham, 37 Me. 451; Chicago *v.* McGinn, 51 Ill. 266; Mechanicsburg *v.* Meredith, 54 Ill. 84; City of Goshen *v.* Myers (Ind.), 25 Am. & Eng. Corp. Cas. 1; People *v.* Saratoga & R. R. Co., 15 Wend. 133; Smoot *v.* Wetumpka, 24 Ala. 112; Humphreys *v.* Armstrong Co., 56 Pa. St. 204; Atlanta *v.* Champe, 66 Ga. 659; Bishop *v.* Centralia, 49 Wisc. 669; Pray *v.* Jersey City, 32 N. J. L. 394; Bardwell *v.* Jamaica, 15 Vt. 438; Nebraska City *v.* Campbell, 2 Black. 590; Sewell *v.* Cohoes, 75 N. Y. 45; Van Winter *v.* Henry Co., 2 Am. & Eng. Corp. Cas. 512; Eudora *v.* Miller, 2 Am. & Eng. Corp. Cas. 633; Orth *v.* Milwaukee, 2 Am. & Eng. Corp. Cas. 688; Carpenter *v.* Cohoes, 81 N. Y. 21.

Municipal Duties as to Bridges.—As to how far bridges are parts of highways, and the extent of municipal duties regarding them, see Manderschid *v.* Dubuque, 29 Iowa, 73; Chicago *v.* Powers, 42 Ill. 169; Chicago *v.* McGinn, 51 Ill. 266; Mechanicsburg *v.* Meredith, 54 Ill. 84; Burritt *v.* New Haven, 42 Conn. 514; Richardson *v.* Turnpike Co., 6 Vt. 496; Turnpike Co. *v.* Berry, 5 Ind. 286; Cooley *v.* Freeholders, 3 Dutch. (N. J.) 415; Humphreys *v.* County, 56 Pa. St. 204; Smoot *v.* Wetumpka, 24 Ala. 112; Escanaba Co. *v.* Chicago, 2 Am. & Eng. Corp. Cas. 220; Van Winter *v.* Henry County, 2 Am. & Eng. Corp. Cas. 512; Abernethy *v.* Van Buren Township, 2 Am. & Eng. Corp. Cas. 590; Eudora *v.* Miller, 2 Am. & Eng. Corp. Cas. 633; Board of Commissioners *v.* Brown, 2 Am. & Eng. Corp. Cas. 652; Lewer *v.* Sedalia, 2 Am. & Eng. Corp. Cas. 658; Fulton Iron Works *v.* Kimball Township, 2 Am. & Eng. Corp. Cas. 673; Orth *v.* Milwaukee, 2 Am. & Eng. Corp. Cas. 688; Louisville Bridge Co. *v.* Louisville, 3 Am. & Eng. Corp. Cas. 583; Denver *v.* Dinsmore, 4 Am. & Eng. Corp. Cas. 568.

PHILADELPHIA BALL CLUB, LIMITED,

v.

CITY OF PHILADELPHIA.

(*Supreme Court of Pennsylvania, Oct. 6, 1899.*)

Change of Street Grade—Injury to Property—Measure of Damages—Elements of Damage.*—In an action against a municipal corporation by the lessee of a baseball park to recover damages for injury to the property caused by a change of street grade, as in other eminent domain cases, only the difference in the actual value of plaintiff's interest in the property immediately before and immediately after the injury, and caused by it, can be considered; and it is not proper to include loss of future profits in such valuation, nor any damages which are imaginary, speculative, or remote; nor are circumstances occurring after the completion of the injury entitled to any weight.

Same—Damages—Delay of Payment.—In such action, plaintiff was not entitled to recover anything on account of delay in the payment of the damages actually sustained, caused by the contest in the courts as to the amount recoverable, such contest having been the result of the unreasonable demands of plaintiff.

APPEAL by defendant from Philadelphia county court of common pleas. *Reversed.*

R. Alexander and *John L. Kinsey*, for appellant.

John I. Rogers and *Alexander Simpson*, for appellee.

GREEN, J. The solution of the questions arising upon this record is not difficult, if we do but define with accuracy the rule which controls the assessments in all cases of this character. There has never been a better statement of that rule than was given in the case in which it originated. Although the decision was made 78 years ago, it has proved itself equal to all the emergencies ard contingencies, and all the ever-varying conditions and questions, that have been

Change of Street Grade—Injury to Property—Measure of Damages—Elements of Damage.

*See notes at end of case.

developed in the almost innumerable cases that have arisen since it was pronounced. Fortunately, the original case was not one of the mere taking of land by a railroad company, and, more fortunately still, it presented and decided a question of future results which it was contended might or would have happened after the direct injury was inflicted. Since that day, in an infinite variety of circumstances, it has been sought to found a right of recovery upon subsequent events, not in existence at the time of the injury, but which it was claimed might or would result, with a greater or less degree of natural or probable sequence, from the injurious act or appropriation complained of. But the doctrine then announced for the first time has proved to be so just, so sensible, so reasonable, and yet so entirely adequate to the proper and legitimate demands of the party injured, that it has received the constant and persistent sanction and approval of this court through all the years that have since elapsed to this very day. The case referred to is Navigation Co. *v.* Thoburn, reported in 7 Serg. & R. 411, and decided in the year 1821. The opinion was written by MR. JUSTICE GIBSON. It was not a case of the taking of land, but of injury by the flooding of the plaintiff's land with water. It originated under the provision of the tenth section of the act of March 8, 1815, incorporating the Schuylkill Navigation Company, which gave a remedy for the inundation of land by means of dams erected in the river in the creation of the system of slack-water navigation of the river Schuylkill. The plaintiff was the owner of a cotton mill erected on and near to the mouth of a small stream tributary to the river, and when a dam was built in the river below the stream the water flowed upon the land of the plaintiff, and into the tailrace of his mill, so seriously that the water power of the mill was destroyed, and the owner was obliged to remove his machinery to another mill. Of course, his injury was most serious, and it was direct. One of the claims of the plaintiff was for damages resulting from the loss of his business which would occur after the injury. Another question was as to the time at which the

damages were to be estimated as having been suffered, and these two were the principal contentions in the case. MR. JUSTICE GIBSON, in the course of the opinion, thus states and disposes of these questions: "The material inquiry is, at what point of time were the jury to estimate the damages as having been suffered? Indisputably, at the time when the injury complained of was complete, which was the moment the dam was finished, or, rather, when the obstruction, by swelling the water permanently, produced its most injurious consequences. The principle that the extent of an injury at the time it is suffered is to govern the compensation to be received, without regard to enhancement from subsequent circumstances, is familiar, and applicable to all cases which I at present recollect, where compensation is to be made in damages. * * * The compensation was to be prospective, as well as retrospective, but to be estimated with reference to the time when the injury was committed. It was, in fact, to be the price of a privilege to swell the water to a particular height for an indefinite time. Now, this price was due the moment the privilege was entered upon and the price could be ascertained, which was obviously the time when the obstruction was first completed. The jury were therefore to ascertain what was then due, and the amount clearly could not be enhanced, or in any way affected, by subsequent injuries, the consequences of the obstruction. How far the omitting to instruct the jury to this effect may have operated on the amount of the compensation assessed I am unable to say, as the bills of exceptions contain no more of the evidence than is absolutely necessary to an understanding of the points submitted; but, as the particular injury to the plaintiff in his business as a manufacturer was necessarily subsequent to the erection, and as the defendant prayed the direction of the court on the legal effect of the evidence relating to that part of the case, he was entitled to have it; for, so far, it would have operated in his favor. * * * The jury are to consider the matter just as if they were called on to value the injury at the moment when

compensation could first be demanded. They are to value the injury to the property, without reference to the person of the owner or the actual state of his business; and, in doing that, the only safe rule is to inquire, what would the property, unaffected by the obstruction, have sold for at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation."

It may be well enough to pause at this point, before referring to other authorities, to consider the application of the foregoing decision to the facts and questions arising in the case at bar. It was a case of injury, and not of taking. There was a manifest, serious, and real injury inflicted directly upon the owner by the act of the defendant company. It involved necessarily a question of future results in depriving the owner of the business and its profits which would occur in the future. About that aspect of the case there could be no question. But this court held (1) that only the difference in the actual value of the entire property before and after the injury was inflicted could be considered; (2) that the time at which this difference of value was to be estimated was immediately after the injury was completed; (3) that no consideration could be given to circumstances occurring after the completion of the injury; (4) that in no event could there be any recovery for loss of profits of business resulting from the enforced abandonment of the mill and its machinery; (5) that there could be no recovery for any damages which were imaginary, speculative, or remote. All of these rulings have been repeatedly sustained and enforced ever since the Thoburn Case was decided.

Applying these principles to the present case, let us inquire how it is affected by them. The plaintiff ostensibly sought to conform to, at least, the letter of the rulings above stated. The witnesses were asked to state what was the depreciation in the market value of the leasehold caused by the change of grade in the streets. They did this in this way: They fixed a valuation of the leasehold at the sum of $296,000; one of

them, $300,000. They then specified a number of items of damage caused by the change of grade, according to their ideas, and made the aggregate of these items $61,082. Deducting this from $296,000 left a resulting sum of $234,918, and that sum they said was the value of the leasehold after the change of grade. As a matter of course, the legal sufficiency of this kind of an estimate depends absolutely upon the character of the details which make up these aggregates. Looking at the method by which the valuation of the leasehold before the change of grade was worked, we find it consisted of a valuation of $110,000 for all the buildings, improvements, and fixtures of the park, and $186,000 as the value of the business to be done during the remainder of the term of the lease, after the change of grade was made, to the end of the lease. It seems incredible that this method could have been allowed or could have received any kind of sanction, but a few citations from the testimony will demonstrate the correctness of the statement. The witness who invented this mode of fixing a valuation was the largest stockholder of the plaintiff company, he was the chief witness in behalf of himself and his company, and was also one of the counsel in the case for the plaintiff. He was asked: "Q. Tell us what, in your judgment, the market value of the leasehold of the Philadelphia Ball Club, Limited, was immediately prior to the change of grade of Broad street. A. I valued it then at $296,000, after careful examination. Q. Will you tell us what was the market value of that leasehold immediately after the change of grade, as affected by that change? A. I valued the leasehold immediately after the change of grade at $234,918. Q. Making a depreciation caused by the change of grade of how much? A. $61,082. * * * Q. The value as given by you before the change of grade includes what? A. It includes the balance of the lease, which was twelve years and five months to run, and the fixtures of the ball park, consisting of all its buildings and improvements, fences, gates, ticket offices, and every thing, which I knew was worth $110,000. That, included in

the estimate of the whole thing, I made $296,000." According to this, the value put upon the lease for 12 years and 5 months was $15,000 per annum.

The method was more clearly explained by the witness A. J. Reach, who was the president of the club. He was asked: "Q. You value the whole thing before the leasehold at $296,000? A. Yes, sir. Q. How did you make up that value before? A. As I said, a moment ago I went to the club's office, and got such information as I could, knowing I was to be a witness here, and our improvements cost $110,000,—what we had at that time, our buildings and so on. In figuring over what our profits were, and averaging, it would be a low estimate to figure them out what the difference would be in twelve years; in other words, something over $15,000 a year. Q. That is, I suppose, having counted $110,000 for fixtures, that would leave $186,000 to be accounted for? A. Yes, sir. Q. Then you said this leasehold runs twelve years? A. Yes, sir. Q. And you said there is a profit each year over and above what you have to pay for rent? A. I said we struck an average for a number of years. Q. The average net profit for a number of years, calculating for a number of years, would justify you in saying that there was in that leasehold $186,000? A. Yes, sir."

Here it appears again that the valuation of the plaintiff's property consisted of $110,000 as the value of all the physical property owned by it, and $186,000 consisted of profits of business which were to be made in the future, during a period of 12 years and 5 months. If this is a lawful method of assessing a property which has been injured by an exercise of the right of eminent domain, then the decision of this court in the Thoburn Case was a wrong decision, and ought never to have been made; for we there said: "It is evident that the profit in any branch of manufactures must mainly depend on the amount of capital invested, the number of workmen employed, and the extent of the business carried on; but it would be plainly unjust to put it in the power of the plaintiff, by an increase of all these to an amount beyond what the de-

mand for the manufactured article would justify, to charge the defendant in the same proportion for the injury sustained by the impeding of his works in his business thus extended as for a loss in his ordinary mode of carrying it on. That would make the defendant an insurer of ordinary profits in a new state of the business pushed to a morbid extent, and would put it in the power of the plaintiff to increase the damages to any extent he might think proper. I mention this to show the danger of taking into consideration circumstances posterior to the time when the privilege is fully entered on, and its consequences to the individual to be compensated are ascertained."

To sustain the valuation upon which the present case was founded, the plaintiff in the Thoburn Case should have been permitted to prove, first, the actual value of his physical property, including his land, his cotton mill, machinery, and all his other tangible property, real and personal, and, in addition to that, to prove what the annual profits of his business were, and then to add the principal sum which those profits would represent at 6 per cent. interest to the value of the physical property, and this court would have been bound to declare that the aggregate of these sums was the value of the plaintiff's property before the injury was inflicted. But we not only did not do that, and thereby sanction such an absurd proposition, but declared that the future profits of the plaintiff's business were not to be considered for any purpose whatever, not even to show the diminution in the value of his property, by showing the loss of his future profits, when he was actually driven out of his mill and compelled to quit doing any business there. As a matter of course, this manner of adding to the value of the actual property the value of future profits, which are entirely uncertain and may never be realized, was altogether illegal, and should never have been permitted. But, bad as this feature of the plaintiff's case was, it was no worse then the other details of what the witnesses chose to describe as damages suffered by the change of grade. When asked to state how the $61,092 of loss was

made up, they said it was composed in part of $38,082 depreciation in fixtures, $13,000 depreciation in the value of the leasehold, and $10,000 for detention of payment. In making up the $38,082 item, they said it was composed in part of $6,589.63 for regrading the ball field, $9,871.26 for rebuilding right-field seats, $15,543 for rebuilding walls and fences, $1,267 for loss of gate, $1,627 for cost of fences, and a number of smaller items. It is only necessary to deal with the larger items. The depreciation in the value of the leasehold, when described by the witnesses, represented 12 years' loss, at $1,000 per year, resulting from a supposed diminution in the receipts of the business, because the drainage, after the change of grade, was not as perfect as it was before the change. As a matter of course, no such testimony could be permitted, either before or after such a result occurred. But, in point of fact, there was not a particle of testimony to show that there was any diminution of actual receipts to that amount, and it was all a mere guessing estimate of what the loss of profits would be on this account during the whole of the remaining 12 years of the lease. In addition to this, it was affirmatively proved by the plaintiff's witnesses that, instead of a falling off of business during the years following the change of grade, from this or any other cause, there was an actual and large increase in the business. It was represented by the attendance of spectators in constantly advancing numbers, as follows: In 1892, the attendance was 197,574; in 1893, it was 293,924; in 1894, it was 352,773; in 1895, it was 414,891; in 1896, it was 357,025. We dealt with this subject when this case was here before (182 Pa. St. 362, 38 Atl. 357), and then said: "Now, upon comparing the business of 1893 with that of 1892, it will be found that there was a gain of very nearly 50 per cent. over the business of 1892. The business of 1894 showed a gain of just about 65 per cent. over the business of 1892, and of 10.6 per cent. over that of 1893. The business of 1895 showed a gain of more than 100 per cent. over that of 1892, and a little rising of 23 per cent. over that of 1894.

In this state of the testimony, it is absolutely established by the affirmative and uncontradicted evidence of the plaintiff that there was not only no loss of business resulting from the change of grade, but a very large increase of business between the time before and after the change of grade. * * * In this particular case we find there was a positive and very large increase in the business of the club after the change. Hence it is not true that there was or could be a diminution in the value of the plant on account of a loss of business, for the simple reason that there was no loss."

On this subject of the loss from inferior drainage, Mr. Rogers, the principal witness for the plaintiff, gave his views of the loss resulting from this source in the following manner: "After those things were done, or ought to have been done, the leasehold estate was depreciated, in my opinion, at least $13,000. Ten thousand dollars of that I think is a conservative estimate as to its injury by reason of the drainage being still very much inferior to the surface drainage that we formerly enjoyed." On cross-examination he said: "The $10,000 was after we had fixed our grounds in the best possible way. We have still a ground—that is, a baseball lease of ground—for twelve years and five months that is worth in the market at least $10,000 less to a purchaser then it would have been if we had had surface drainage." As the witness gave no explanation of his opinion except loss of business, he was asked as to how the business was after the change in the grade of the street was made and before the change in the grade of the field. He said: "The regrading of the playing field began in November or October, 1895, but we did not finish it." He was asked: "Q. You played ball through the year 1893, the change of grade commencing in August, 1893? A. Yes, sir. Q. You did not miss a day during that year, did you? A. The balance of that year; no, I think not. Q. You played ball there the year 1894, did you not? A. Yes, sir, except on certain days when the condition of the ground did not let us. Q. There were three days you have stated during the year 1894 when you did not play ball? A.

Three days when we were at home that we would have played, but did not play. Q. You played ball all through the year 1895, with the exception of one day? A. One day. * * * Q. How many days were you unable to play in the year 1896 on account of defective drainage? A. The club played every game it was scheduled to play in 1896. Q. How many games were you unable to play in 1897 on account of defective drainage? A. One." Thus it seems that no day was lost in 1893, three days were lost in 1894, one day in 1895, none at all in 1896, and one in 1897. For this the city is asked to pay a sum of $10,000, by the testimony of this witness, and $15,000 by that of Shetzline, who was the secretary of the club, because the leasehold would be worth that much less, by reason of the loss of business, when in point of fact the business of the club steadily and largely increased during all the years until 1896. In 1896 and 1897 there was a falling off in the business, and Mr. Rogers explained just how that occurred. He said: "The attendance at our ball games depends mainly on two circumstances, the most important of which is the luck of winning games after a close competition. If you have a close competition with the other clubs, and can win your share of games, the public come out in crowds. If you do not, they religiously stay away in crowds. That is the most important. The next important is having a place where it is the center of transportation facilities. That is the centre of all transportation facilities of this town, having the two main railroads, and all the trolley cars congregating there. * * * In 1896 we played very poor ball indeed,—very wretched,—and our attendance went down. In 1897 we did even worse, and our attendance went down." From this testimony it is apparent that loss of business is due to the quality of the play, and that the loss in 1896 and 1897 was due to the bad playing, while the business constantly advanced during all the years from 1893 to 1895, both inclusive, notwithstanding the condition of the drainage. It follows hence that any inference as to the value of the business at times posterior to the change

in the grade of the streets has not the least importance, which the law can recognize, in the determination of the question of the difference in the value of the property affected before and after the infliction of the injury. The writer has gone into the analysis of this testimony, not for the sake of showing what the real value of the business done on this property in the years succeeding the change in the grade of the streets was, but for the purpose of illustrating the wisdom of the rule which prohibits all such inquiries in cases of this kind. The business to be done in the future on or with a property which is taken or injured under the power of eminent domain is uncertain, remote, imaginary, entirely incapable of being determined with truthfulness, and the testimony on such subjects is the result of the personal interest or the friendly bias of the witnesses, and hence necessarily and absolutely unreliable. Ever since the decision of the Thoburn Case, all such inquiries and all such evidence have been positively prohibited, and cannot in any circumstances be permitted to affect the decision of such cases as this. The underlying principle upon which such damage questions must be determined necessarily precludes the consideration of such testimony; for it is a fundamental proposition that the valuation of the property affected must be made immediately before and immediately after the property is taken or the injury is inflicted, and the difference in those valuations is the measure of the damages which the owner may recover. In the present case the change in the grade of the streets was made in August, 1893, and the value of the leasehold at that time, as contrasted with its value in the spring of 1892, when the work was commenced, must represent the damages to which the plaintiff is entitled. It was proved by the plaintiff's witnesses that the ball playing went on during the years 1893, 1894, and 1895, just as it had been conducted previously to that time, without any change in the grade of the field, and with a largely increasing business. It was not until three seasons had been finished that any changes were made in the field, and after that time the work was

done for which the very large damages in question are now claimed. As a matter of course, these works and improvements, being long subsequent to the change of grade, could not lawfully have entered into the computation of the leasehold in 1893, for the very simple reason that nothing could be known about them at that time; they were long subsequent at the time of their occurrence. They were not at all a matter of necessity, but of mere improvement of the conditions of the field. The grade of the field was changed in the latter part of 1895, after the season had closed, and for this the plaintiff demands that the city shall pay as damages $6,589.63. There is no principle in the law upon this subject upon which this claim can be sustained. As the case was tried, the jury was allowed to award the whole amount of this work as specific damages for the change in the grade of the streets made three years before. It is too plain for argument that no part of it can be allowed, either specifically as the cost of so much work done, or as entering into the value of the leasehold at the time the grade of the streets was changed. If such a claim could be allowed for work done at the end of three years, there is no reason why it could not be allowed for work done at any time afterwards during the pendency of the lease. We rule now distinctly and positively that the whole of this claim must be rejected in any subsequent trial of this case. The same is true with increased force as to the claim for $9,871.26 for rebuilding the right-field seats. These seats were continued in use after the change of grade in the streets precisely as they had been before, until in August, 1894, when they took fire and were destroyed. They were at once rebuilt, as they had been before, and remained in use during 1894, 1895, and 1896. In 1896 the club decided to build an entirely new system of seats, on a larger and much more expensive scale. They accordingly did so, at an expense of $38,000, and they now claim that the city should pay one-fourth of this sum ($9,500), upon the theory that it would have cost that much to rebuild the part which was required

by the change of grade. This work was not commenced until 1896, and finished in 1897, long after the present proceeding was begun, and several months after the first verdict was rendered. This work was done by the plaintiff for its own convenience, and for the purpose of improving its business by making the field more attractive. It had nothing on earth to do with the change of grade in the streets, and in no conceivable point of view can a single dollar of this claim be allowed or be permitted to affect the valuation of the leasehold in 1893, immediately after the change of grade in the streets. It must all be rejected for any purpose whatever.

Another claim was made on the trial which, if possible, is more indefensible than any of the others. It is a claim for $10,000 for detention of payments, on the theory that the plaintiff suffered damages on that account, and was entitled to be paid that amount in lieu of interest. If the plaintiff suffered any damage on this account, it has nobody but itself to hold responsible for that result. It would have been a plain dereliction of duty on the part of the city officials if they had paid without a contest in the courts the grossly excessive and unreasonable demands of the plaintiff. In the former trial the claim was for $85,000, and it was sought to be supported by theories and testimony of such an illegitimate character that we were obliged to reverse the judgment, although the jury only allowed $29,000 by their verdict, thus condemning the whole of the demand in excess of that sum. On the last trial, other theories and testimony were set up, in support of a demand for $62,000, quite as indefensible and unreasonable as the demand on the first trial. The jury on the last trial refused all of the claim over $39,000, and the court below struck out all over $30,000. It is therefore manifest that it is the oppressive and unreasonable demands of the plaintiff that have caused the delay in the payment of the damages really sustained by the plaintiff. As a matter of course, there can be no recovery of any sum whatever for such a claim in such circumstances, and the whole of this claim must be rejected. It was error to leave such a ques-

tion to the jury at all. In Richards *v.* Gas Co., 130 Pa. St. 37, 18 Atl. 600, our BROTHER MITCHELL, in commenting upon claims of this character, and speaking for the whole court, said: "Interest is recoverable of right, but compensation for deferred payment in torts depends on the circumstances of each case. The plaintiff may have set his damages so inordinately high as to have justified the defendant in refusing to pay, or in other ways the delay may have been the plaintiff's fault. * * * In such cases, the jury probably would not, and certainly ought not, to make the allowance." It is altogether likely that when the two persons who own the majority of the stock of the plaintiff company can make up their minds to accept a fair and reasonable sum for their claim an adjustment will quickly follow. But it must not be expected that the imaginary, remote, speculative, and illegitimate demands that have thus far been set up, or any others of like character, will ever receive the sanction of this court. There are other objectionable items in the plaintiff's claim, but, as they are not covered by any of the assignments of error, we do not discuss them. The fundamental method which was adopted to establish the difference of value in the leasehold before and after the change of grade is radically vicious and fallacious. Fixing a valuation before the change by adding the anticipated profits of 12 years and 5 months in the future to the value of the physical property is so glaringly and violently in opposition to all our decisions that it must be entirely rejected in any future trial of the case. Then the method of building up an extravagant mass of items of alleged damage, nearly all of them based upon future transactions, remote, imaginary, speculative, and altogether illegal, and naming the aggregate of all of these as the difference in the value of the leasehold before and after the change of grade, is so certainly contrary to the law of this commonwealth that it cannot possibly be sustained.

Some reference to a few of our more modern decisions will be appropriate in this connection.

[illegible]

In the case of Watson v. Railroad Co., 7 Pa. St. 47, we said, speaking of the claim of the owner: "He was allowed the amount of the sale and upon it Justice Gibson, in Thoburn's Case, 7 Serg. & R. 411, that he the measure of compensation is the difference between what the whole property would have sold for unaffected by the railroad, and what it would have sold for as affected by it. Nor was he compelled to take a very large sum from out of the pocket of the owner which he offered. His measure was the proof of the difference between the two values was entirely speculative, and hence was the reason for the rejection of the evidence. It is there all had the same fault. They proposed to show by the jury the conjecture of the witnesses as to what the city of Lancaster would be worth at some unknown future time when the railroad shall have been made. Such testimony does not rise even to the standard of an opinion. It is a mere guess, with no substantial foundation upon which to rest. * * * An estimate of what property will be worth at a future day, or in an altered condition, is entirely without guide or measure, and must be wholly fanciful."

In Hornstein v. Railroad Co., 51 Pa. St. 87, decided in 1865, we said: "If judicial authority can fix any rule, the series of adjudged cases, from Thoburn's Case, 7 Serg. & R. 411, down to Harvey's Case, 47 Pa. St. 434, has established the measure of damages for building a railroad through a man's land to be the difference betwixt the value of the land before the road was built and its value after the road is finished. In estimating the disadvantages resulting from the road, consequential or speculative damages are to be rejected."

In Railroad Co. v. Braham, 79 Pa. St. 447, decided in 1875, we said: "In one of the early cases upon this subject (Navigation Co. v. Thoburn, 7 Serg. & R. 411), it was held by this court that the jury should consider the matter just as if they were called upon to value the injury at the moment when compensation could first be demanded. They are to value the injury to the property without reference to the per-

son of the owner, or the actual state of his business, and in doing that the only safe rule is to inquire what the property, unaffected by the obstruction, would have sold for at the time the injury was committed. What would it have sold for, as affected by the injury? The difference is the measure of the compensation. This rule has been followed in Railroad Co. *v.* Heister, 8 Pa. St. 450," and a large number of other cases, citing them. "In none of these cases is there any authority for the doctrine that the value of the land is to be limited to, or measured by, a particular use."

In Railroad Co. *v.* Patterson, 107 Pa. St. 461, we said: "But the court was certainly correct in saying that the jury could not take into consideration any supposed loss to the plaintiff of profits in his business. Such an assessment would be merely speculative, and a rule which justified it would lead to most ruinous results."

In Railway Co. *v.* McCloskey, 110 Pa. St. 436, 1 Atl. 555, decided in 1885, we said: "In estimating the damages to a landowner caused by the construction of a railroad, the rule as to the measure of damages declared by JUDGE GIBSON in the case of Navigation Co. *v.* Thoburn, 7 Serg. & R. 411, has ever since been recognized and followed;" stating the rule: "Merely speculative damages cannot be allowed. * * * The jury cannot include in the verdict a fund to cover the costs of fencing, or to provide an indemnity against losses by fire, or casualties to the cattle and stock upon the farm. Such an assessment must necessarily be purely speculative, as the matters thus sought to be provided against are in their nature altogether ideal and fanciful. * * * The estimate of a merely prospective injury can be founded in no rational or correct legal principle, and cannot therefore be allowed."

In Railroad Co. *v.* Cleary, 125 Pa. St. 442, 17 Atl. 468, there is a good illustration of the application of the rule to those subjects which are proper, and those which are improper, to be considered by the jury: "The true measure

of the damages sustained by any given lot of land is found in the difference between its selling value before and after the injury complained of. It is proper to consider for what purpose it may be used to advantage, in order to determine for what price it will sell. It may be salable as a site for the erection of a hotel, a factory, a dwelling, or a wharf, but it is not proper to lay before the jury proof of what the hotel or other structure would cost, together with proof of the value of the lot with such structure upon it, and treat the difference between these sums as the value of the lot. Such a method would be speculative and fanciful. Equally improper is evidence showing how many building lots the tract under consideration could be divided into, and what such lots would be worth separately. It is proper to inquire what the tract is worth, having in view the purposes for which it is best adapted; but it is the tract, and not the lots into which it may be divided, that is to be valued. * * * The jury are to value the tract of land, and that only. They are not to determine how it could best be divided into building lots, nor conjecture how fast they could be sold, nor at what price per lot. * * * They [the jury] are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in."

In Railroad Co. *v.* Stocker, 128 Pa. St. 233, 18 Atl. 399, we said: "The proper and legitimate inquiry in all these cases is, what was the actual market or selling value of the property, just as it was immediately before the land was taken for the railroad, and what was its same value after the completion of the road? Of course, the possible uses of the ground may be considered and estimated by the witness in forming his opinion; but it would be highly dangerous to permit verdicts to be founded upon a consideration of future speculative operations which may never transpire, and whose results, whether profitable or otherwise, cannot be known in advance."

When this case was here before (182 Pa. St. 362, 38 Atl.

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357), we said: "But, in a mere legal sense,—and that is the way we are obliged to view it,—the radical and fatal vice of the contention we are now considering is that it is entirely too remote, altogether imaginary, and purely speculative to the last degree. All the elements of certainty in deductions are absent. They exist only in the future, and therefore cannot be known. They depend upon variable and uncertain conditions, and they cannot possibly form the basis of a sound and reliable judgment." These authorities might be multiplied, but it is not necessary. We are clearly of opinion that all the assignments of error must be sustained. Judgment reversed, and new venire awarded.

NOTES.

Eminent Domain—Measure of Damages.—The measure of damages in an action to recover for injury to abutting property by reason of a change of the street grade is the difference between the market value of the property immediately before it become known that the grade would be lowered and its market value just after the grade was lowered. City of Louisville *v.* Hegan *et al.* (Ky.), 1 Mun. Corp. Cas. 284; San Antonio *v.* Mullaly, 11 Tex. Civ. App. 596, 33 S. W. 256; Wolters *v.* St. Louis, 132 Mo. 1, 33 S. W. 441; Jacksonville *v.* Loar, 65 Ill. App. 218; Lee *v.* Springfield Water Co., 176 Pa. St. 223, 35 Atl. 184.

Same—Prospective Profits—Damages.—In Pause *v.* Atlanta, 98 Ga. 92, 26 S. E. 489, it was held that proof of loss of profits was admissible only as in reference to the value of the lease, in an action to recover for injury to a leasehold estate from a public improvement, and that the decrease in market value of the premises for rent during the remainder of the lease.

So in Cobb *v.* Boston, 109 Mass. 438, it was held that the profits of the business and similar elements could not be considered.

In Becker *v.* Philadelphia & R. T. R. Co., 177 Pa. St. 252, 6 Am. & Eng. R. Cas., N. S., 174, it was held that loss of profits of a business carried on upon the premises by reason of the taking of the place of business cannot be recovered in condemnation proceedings.

And in Pittsburgh & W. R. Co. *v.* Patterson, 107 Pa. St. 461, it was held that the jury cannot take into consideration any supposed loss to the plaintiff of profits in his business by reason of the appro-

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priation of his property by the railroad company. De Buol *v.* Freeport & M. R. R. Co., 111 Ill. 499; Chicago, etc., R. Co. *v.* Dresel, 110 Ill. 89; Illinois C. R. Co. *v.* Lostant, 167 Ill. 85, 47 N. E. 62.

Damages are not to be given for the probable injury which the business of a landowner may suffer from competition, introduced by the building of the new road. Petition of Mt. Washington Road Co., 35 N. H. 134; Harvey *v.* Lackawanna & B. R. Co., 47 Pa. St. 428.

So it was held that testimony to show that the value of the property as a whole had depreciated $30,000 since such appropriation should have been stricken out, where such estimate was based upon wholly speculative profits to be realized through a proposed increase of the plant upon the strip taken by defendant. Hamilton *et al. v.* Pittsburg, B. & L. E. R. Co. (Pa.), 13 Am. & Eng. R. Cas., N. S., 376.

In assessing the damages that will be done to a turnpike road by reason of the building of a railroad, the fact that the business of the turnpike company will be diminished by reason of the railroad running in the same general direction, and by its carrying persons that would otherwise travel on the turnpike, cannot be considered. Troy & B. R. Co. *v.* Northern Turnpike Co., 16 Bard. (N. Y.) 100.

In an English case, however, Ripley *v.* Great Northern R. Co., L. R. 10 Ch. 435, prospective profits were considered. An owner of land constructed a reservoir thereon for the purpose of supplying the town with water. A railroad took part of the land, upon which he expected mills would be erected to which he would supply water from the reservoir. He claimed, as compensation, a certain sum as the value of the land taken, and another "for prospective profits to be derived from supplying, from his reservoir, water to the mills which might be built upon his other lands." It was argued in the Court of Chancery Appeals that "the reservoir ought only to be valued as so much land." Said SIR W. M. JAMES, L. J.: "He was to be compensated for any damage done to his other land. He says that he is very much damaged as to his other land by the diminution in value of a reservoir which is left upon his hands, and which will probably supply some water, but which was intended to supply a great deal more. This water he is now prevented from supplying by reason of the acts of the railway company, and that was a damage to be supplied in some way or another." One of the other judges said that "evidence of profits was properly received * * * for the purpose of arriving at what was the real sum to be awarded, making all proper deductions.

And in Weyer *v.* Chicago, W. & N. R. Co., 68 Wis. 180, 31 N. W. Rep. 710, it was held that in estimating the value of land taken for

a railroad, the jury may take into consideration its productiveness, or the income which might have been derived from it if it had not been taken.

Same—Interest on Damages—Appeal.—Where the damages are increased on appeal, interest may be added. Selma, etc., R. Co. *v.* Gammage, 1 Am. & Eng. R. Cas. 41, 63 Ga. 604; Sioux City, etc., R. Co. *v.* Brown, 10 Am. & Eng. R. Cas. 406, 13 Neb. 317; Hartshorn *v.* Burlington, C. R. & N. R. Co., 52 Iowa 613, 3 N. W. Rep. 648; Hollingsworth *v.* Des Moines & St. L. R. Co., 17 Am. & Eng. R. Cas. 113, 63 Iowa 443; Burlington & M. R. Co. *v.* White, 28 Neb. 166, 44 N. W. Rep. 95; Shattuck *v.* Wilton R. Co., 23 N. H. 269. And interest will be allowed if the premises have been vacated and remain unoccupied, even though the company has paid the money into court. Uniacke *v.* Chicago, etc., R. Co., 27 Am. & Eng. R. Cas. 424, 67 Wis. 108; Atlantic & G. W. R. Co. *v.* Kloblentz, 21 Ohio St. 334.

Where a diminution of the award is obtained on appeal, the company is entitled to recover such diminution with interest. Watson *v.* Milwaukee, etc., R. Co., 10 Am. & Eng. R. Cas. 168, 57 Wis. 332. And in Reisner *v.* Atchison Union Depot, etc., R. Co., 10 Am. & Eng. R. Cas. 155, 27 Kan. 382, where the landowner, upon an appeal from the award of commissioners as to the appraisement of value and assessment of damages for right of way, recovered a less amount than the original award, he was held not to be entitled to interest upon the money deposited by the company during the pendency of such appeal. See also Metler *v.* Easton, etc., R. Co., 37 N. J. L. 222; March *v.* Portsmouth, etc., R. Co., 19 N. H. 372.

BOARD OF COM'RS OF OXFORD, N. C., *et al.*

v.

UNION BANK OF RICHMOND, VA.

(*Circuit Court of Appeals, Fourth Circuit, August 11, 1899.*)

Statutes — Change of Judicial Construction Following State Decisions.—A decision of the supreme court of a state sustaining the constitutionality of a statute in one particular cannot prevent such court, upon a subsequent appeal in the same cause, from holding the statute unconstitutional, where another constitutional question is before the court for the first time on the second appeal; nor will the first decision prevent a federal court from following the second decision.

Board of Com'rs of Oxford *v.* Union Bank of Richmond

Following State Decisions.—The decision of the state court of last resort, construing the state constitution and legislation relating to the identical questions and facts involved in a controversy before a federal court, will be followed by the latter.

Invalid Contract—Effect of Judgment by Consent.—A compromise void because of the invalidity of the legislation in pursuance of which it purports to be entered into, is not rendered valid by a consent judgment, based thereon, in a cause in which the validity of the legislation was not in issue.

Municipal Bonds—Validity of Legislation—Municipality Not Estopped by Acts of Officers.*—The board of commissioners of a municipality cannot, by its action, by its agreement, or consent judgment, or the payment of interest on the bonds, estop the municipality from questioning the legal existence or constitutionality of the statute under which it is claimed that its inhabitants are liable to taxation on account of such bonds.

ERROR by defendants to the Circuit Court of the United States for the Eastern District of North Carolina. *Reversed.*

R. O. Burton, for plaintiffs in error.

C. M. Busbee and *J. S. Manning* (*John W. Hinsdale*, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

GOFF, Circuit Judge. This action at law was brought in the circuit court of the United States for the Eastern district of North Carolina by the Union Bank of Richmond, Va., a corporation organized under the laws of the state of Virginia, against the board of commissioners of Oxford, a municipal corporation existing under the laws of the state of North Carolina. The object of the suit was to recover the amount claimed by the plaintiff to be due from the defendant for interest on certain bonds, as shown by coupons then in the possession of the plaintiff, and also to compel the defendant, by *mandamus*, to levy taxes and pay the plaintiff the sum due it.

Case Stated.

The general assembly of the state of North Carolina, at its session held in the year 1891, passed an act to incorporate the Oxford & Coast Line Railroad Company. Laws 1891,

*See notes at end of case.

c. 315. Under the provisions of this act certain counties, cities, towns, and townships were authorized to issue bonds to aid in the construction of said railroad. On March 9, 1891, certain of the citizens and taxpayers of the town of Oxford petitioned the mayor and board of commissioners of that town to provide for an election, under the provisions of the then existing laws, on the proposition to subscribe the sum of $40,000 to aid in the building of the Oxford & Coast Line Railroad, and to issue the bonds of said town to that amount for such purpose. Such election was ordered and duly held, with the result that the bonds were authorized to be issued. On the 4th of August, 1891, at a meeting of the board of commissioners of Oxford, the following order was passed and entered of record:

"Resolved, that the bonds of the town of Oxford, to the amount of forty thousand dollars, of the denomination of one thousand dollars each, payable on the 1st day of December, 1921, with interest not exceeding six per cent. per annum, payable on the first days of June and December every year until maturity, with the right to the town, after ten years, upon three months' notice in some newspaper published in the town of Oxford and the cities of Baltimore and New York, to redeem said bonds, upon paying the sum of $1,050, and the accrued interest on each bond, and upon the completion of a contract by the authorities of the Oxford & Coast Line Railroad for the construction of the same, be delivered to the president of said railroad company to aid or assist in building said railroad, and that whatever proportion of said $40,000 is used in building and equipping said road shall be considered a subscription to the capital stock of said railroad, and a certificate shall be issued to the town of Oxford for stock to said amount."

On the 14th day of July, 1892, the Oxford & Coast Line Railroad Company, together with one James T. Pruden, instituted a proceeding for a *mandamus* in the superior court of Granville county, N. C., against the board of commissioners of Oxford, returnable to July term, 1892. In the complaint

then filed the facts hereinbefore stated were referred to, and, in addition, it was set forth that on the 26th of February, 1892, a contract was duly entered into by and between said railroad company and James T. Pruden for the construction and operation of the road from Dickerson's Station, on the Durham & Northern Railroad, to the town of Oxford; and that on the 3d day of March, 1892, said Pruden began the actual construction of said line of road, and had been, aud then was, engaged in grading and preparing the roadbed, and would soon be ready to lay the track and complete the road for the transportation of freight and passengers; that on May 2, 1892, the said board of commissioners adopted a resolution concerning said bonds, which attemped to nullify the action of said board taken when the result of the election was declared, and that the mayor of the town of Oxford had refused to sign the ordinance directing said subscription, and that said board of commissioners have resolved to and do uphold him in such refusal, contrary to the plighted faith of said town as expressed at said election, and as declared by the resolution of the commissioners themselves; also that the railroad company was desirous of performing its contract with said Pruden, and was unable to do so because of the refusal of said commissioners to issue and deliver the bonds. Therefore the plaintiff in such petition prayed that the defendants be required to perform their said contract, and that a writ of *mandamus* issue commanding said board to issue the $40,000 of bonds so subscribed by said town, and for other and proper relief. The defendants duly answered the petition, and, pending the controversy, an agreement of compromise was entered into between the railroad company, its contractor, Pruden, and the board of commissioners of Oxford, by which it was provided that, in the adjustment of the existing differences, the town should issue its bonds for $20,000 (in the sum of $1,000 each, payable August 1, 1922, with interest, as shown by coupons attached), which should purport on their face to be issued under and in pursuance of said chapter 315, Laws

1891, and chapter 21 of the Private Laws of 1885, and the election held April 27, 1891, as also under the said agreement of compromise, which was to be entered in said suit as the judgment of the superior court of Granville county, with the assent of all the parties thereto. The compromise agreement was dated July 25, 1892, and the judgment of the court, in substance the same as the agreement, was entered during its July term, 1892. On August 1, 1892, the board of commissioners of Oxford issued 20 bonds of the denomination of $1,000 each, which were delivered to the president and treasurer of the Oxford & Coast Line Railroad Company. It is recited on the face of each of said bonds, as follows:

"This bond is issued in pursuance of the powers and the authority granted by the state of North Carolina, as provided in chapter 49 of the Code of North Carolina, and in pursuance of the authority granted by section 30 of the charter of said town of Oxford, which is embraced in chapter 21 of the Private Laws of 1885, as passed by the general assembly of said state, and in pursuance of the authority granted by chapter 315 of the Laws of 1891, passed by the general assembly of North Carolina, ratified the 5th day of March, 1891, entitled 'An act to incorporate the Oxford & Coast Line Railroad Company,' and in pursuance of an election held in said town of Oxford on the 27th day of April, 1891, and of a settlement and adjustment of a controversy and litigation in which the Oxford & Coast Line Railroad Company *et al.* were plaintiffs and the board of commissioners of Oxford and the mayor of said town were defendants, adopted by the board of commissioners July 25, 1892, and the judgment and decree of his honor, H. G. CONNOR, judge presiding at the hearing of said action, at July term, 1892, of Granville superior court."

The plaintiff below, on the 12th day of September, 1892, purchased in good faith, in the usual course of business, 16 of said bonds, paying for each the sum of $975, the plaintiff having no other notice than such as the law implies and as is contained on their face concerning such bonds. The

coupons maturing May 1, 1893, were paid by defendants below when the same were presented. The other coupons, showing the interest due on the bonds held by the plaintiff when this suit was instituted, amounting to $4,320, were duly presented at maturity for payment, and payment was refused. The Oxford & Coast Line Railroad has not, as yet, been completed.

The plaintiff below, before it instituted this suit, had sued the defendants below in the superior court of Granville county, N. C., and that case was twice before the supreme court of that state, being reported as Union Bank of Richmond *v.* Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410, and 119 N. C. 214, 25 S. E. 966. Such suit was a petition for a *mandamus* to compel the commissioners of the town of Oxford to levy taxes to pay the interest due on said bonds. The superior court of Granville county, at the close of the evidence when the case was first tried, intimated an opinion that the bonds were issued without authority of law, and thereupon the plaintiff submitted to a nonsuit and appealed. The supreme court then held that Acts 1891, c. 315, § 10, relating to these bonds, and providing for the mode of payment thereof, was not void under article 7, § 7, of the constitution of North Carolina, because it did not provide for a special election to authorize the issuance of the bonds, as the general laws relating to such elections were applicable. Consequently the nonsuit was set aside, and a new trial granted. When the second trial was held in the superior court of Granville county the point was made, for the first time, that, conceding that Acts 1891, c. 315, by its terms authorized the election, still that act was invalid because it had not been passed in compliance with the requirements of the constitution of North Carolina concerning acts granting the power to counties, cities, and towns to issue bonds. Such provision is article 2, § 14, and is as follows:

"No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly,

for the payment of any debt, or to impose any tax upon the people of the state, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal."

During the second trial in the superior court it was shown that, on the passage of said act in the house of representatives, it passed its second and third readings on the same day, and that the yeas and nays were not entered on the journal on either of said readings. The superior court held that, nevertheless, the bonds were valid, and a verdict was directed for the plaintiff, on which a judgment for the amount claimed was rendered. The defendants appealed, and the supreme court reversed said judgment, holding that the bonds were absolutely void, and incapable of ratification. When the certificate and opinion of the supreme court reached the court below, the plaintiff voluntarily submitted to a nonsuit, and then instituted the suit we now consider, declaring on the same coupons sued on in the state court, and also on others that had become due after the beginning of said first suit. The case was regularly brought on for a hearing, when the court below entered a judgment in favor of the plaintiff for $4,320, the full amount due on the interest coupons that had matured when this action was instituted, and also directed that a writ of *mandamus* issue to the defendants, commanding them to levy sufficient taxes to pay said judgment and the cost of this litigation. 90 Fed. 7. Thereupon the said defendants applied for and were awarded the writ of error we are now disposing of.

The court below appears to have reached the conclusion it did because of the belief entertained by it that, previous to the time of the issuing of the bonds in controversy, the courts of the state of North Carolina had held that the laws under

which they were issued were valid and constitutional, and that their invalidity is now claimed only because of the decisions of said courts, subsequently rendered, which overrule such former judgments, and which, in their force and effect, impair the obligations of contracts, the impairment of which is prohibited by the constitution of the United States. In the opinion of this court, announced during the present term, in the case of Board of Com'rs of Stanly Co. *v.* Coler, 96 Fed. 284, we have fully considered and disposed of the questions relating to the validity of legislation of the character of that under which the bonds now in controversy were issued. This case, so far as it relates to the questions growing out of the provisions of section 14, art. 2, of the constitution of North Carolina, is governed by the decision we announced in that case, and to it and the authorities there cited we now refer in disposing of the like questions herein involved. A further consideration of the points there discussed will be unprofitable.

The contention that the supreme court of North Carolina, when this matter was before it, decided the essential matters involved in favor of the validity of the bonds in suit, is not in our judgment sustained by the opinion of that court. Union Bank of Richmond *v.* Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410. That court decided the case as it was then made and submitted to it, and the record discloses the fact that the questions relating to section 14, art. 2, of the constitution were not raised or presented for consideration until during the second trial of the case. The matter of the efficacy of the act chartering the railroad was not presented by the record when the case first went to the supreme court, and as a matter of course was not passed upon. But the plaintiff below could not have been injured in the least, even if there had been a change of judicial construction when the opinion was announced as reported in 119 N. C. 222, 25 S. E. 966, for the reason that the plaintiff had been the owner of said bonds since the 12th day of Sep-

Statutes—Change of Judicial Construction Following State Decisions.

tember, 1892, and the decisions mentioned were not rendered until on the 26th of March, 1895, and the 17th of November, 1896, respectively. The supreme court of North Carolina has passed upon the identical questions and facts involved in this controversy. It has construed both the constitution of that state and the legislation of the same relating to the bonds in suit, and it has decreed the absolute want of authority in the board of commissioners of the town of Oxford to issue said bonds. Our views concur with the decision of that court in the particulars mentioned; but, independent of that, the construction by that court of the constitution and laws of that state would, under the circumstances of this case, be followed by us.

Following State Decisions.

The defendant in error insists that the judgment by consent entered in the suit instituted by the railroad company in the superior court of Granville county against the plaintiffs in error binds the latter to a compliance with the terms thereof, and renders valid the bonds issued thereunder. This claim is without merit, and is, we think, the result of a misconception of the effect of the compromise that was effectuated by the judgment referred to. The town had no legal right to donate the bonds to the railroad company, nor had it the power to issue them, in order to secure the compromise, unless such power was expressly granted by legislative enactment; and that such was the understanding at the time between the parties to the controversy is shown by the reference, both in the judgment and on the face of the bonds, to the act of the assembly under which the authority to issue them was claimed. The railroad company insisted that the town should issue to it bonds to the amount of $40,000, by virtue of the action taken under the legislation referred to, and the town, while not admitting its liability to that amount, offered to adjust the controversy by issuing, under said enactment, bonds of the character therein described to the amount of $20,000. That offer was accepted by the railroad company, and

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the compromise agreement was signed, the consent judgment entered, and the bonds issued. The validity of the legislation involved was not in issue, and if that legislation was invalid when the compromise was entered into the rendition of the judgment based thereon did not make it valid. If the town had not the power to issue the bonds, the consent of its board of commissioners to the compromise agreement would not cure that defect. Kelley *v.* Milan, 127 U. S. 139, 8 Sup. Ct. 1101; Doon Tp. *v.* Cummins, 142 U. S. 366, 376, 12 Sup. Ct. 220; Norton *v.* Shelby Co., 118 U. S. 425, 451, 452, 6 Sup. Ct. 1121. The board of commissioners of the town of Oxford cannot, by its action, by its agreement, or consent judgment, or the payment of interest on the bonds, estop that municipality from ascertaining the legal existence or constitutionality of an act of the general assembly of North Carolina under which it is claimed that its inhabitants are liable to taxation. Marsh *v.* Fulton Co., 10 Wall. 676; Town of South Ottawa *v.* Perkins, 94 U. S. 260; Doon Tp. *v.* Cummins, *supra*; Daviess Co. *v.* Dickinson, 117 U. S. 657, 665, 6 Sup. Ct. 897; Lewis *v.* City of Shreveport, 108 U. S. 282, 2 Sup. Ct. 634; East Oakland Tp. *v.* Skinner, 94 U. S. 255; Lake Co. *v.* Graham, 130 U. S. 674, 9 Sup. Ct. 654. The judgment of the court below will be reversed, and this cause will be remanded, with instructions to set aside the order awarding a writ of *mandamus*, and then dismiss the complainant's bill.

Municipal Bonds—Validity of Legislation—Municipality not Estopped by Acts of Officers.

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Municipal Corporations—Not Bound by Ultra Vires Acts or Contracts.—See generally extensive *note*, 1 Mun. Corp. Cas. 167 *et seq.*

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INCORPORATED TOWN OF SCRANTON

v.

DANENBAUM.

(*Supreme Court of Iowa, Oct. 4, 1899.*)

Ordinances—Judicial Notice.*—A municipal court will take judicial notice of ordinances of the municipality, as it stands in the same relation to them as a state court to public statutes.

Same—Same—Constitutionality of Statute.—The contention that the statute of Iowa providing, in substance, that the district court, upon appeal from a municipal court, shall take judicial notice of the ordinances of the municipality is unconstitutional, in that it puts the onus of proving the absence of an ordinance upon the party accused of its violation, and, therefore involves a presumption of guilt, is without merit.

APPEAL by defendant from Greene county district court. *Affirmed.*

F. M. Powers, for appellant.

Rose & Henderson, for appellee.

LADD, J. The trial court found the defendant to have been a transient merchant at the time the information was filed, and this conclusion has such support in the evidence as to preclude any interference on our part. But the appellant contends there was no proof of an ordinance fixing the license for transient merchants, or imposing a penalty for its violation. Formerly such an objection would have been fatal to the record, as an ordinance, being in the nature of a private statute, must have been pleaded and proven. Garvin *v.* Wells,

*In addition to the authorities cited in the leading case, see 1 Dill. Mun. Corp. (4th Ed.) §§ 413, 422 *note*.

As to Judicial Notice of Ordinances by other than municipal courts, see State *v.* Cruickshank (Vt.), 1 Mun. Corp. Cas. 399, and *note*; Watt *v.* Jones (Kan.), 1 Mun. Corp. Cas. 400.

8 Iowa, 286; Goodrich v. Brown, 30 Iowa, 291; Wolf v. City of Keokuk, 48 Iowa, 129. The town or city court, however, has always taken judicial notice of the ordinances of the municipality in which sitting, as it stands in the same relation to these as the state court to public statutes. Conboy v. Iowa City, 2 Iowa, 90; State v. Leiber, 11 Iowa, 407; Town of Laporte City v. Goodfellow, 47 Iowa, 572; 12 Am. & Eng. Enc. Law, 168. Under section 692 of the Code the same rule obtains in the district court when a case is carried on appeal to that tribunal. That section reads in part: "On the hearing of such appeal, or writ of error, the court shall take judicial notice of the ordinances of the city or town." Under this statute the ordinances must be recognized and acted upon as such without averment of proof; that is, in so far as the case on appeal or writ of error is concerned, the ordinances of the municipality will be taken judicial notice of precisely the same as public statutes. Such has been adjudged the rule in Kansas without the aid of legislation. Downing v. City of Miltonville, 36 Kan. 740, 14 Pac. 281; City of Solomon v. Hughes, 24 Kan. 211. This does not put the onus of proving the absence of an ordinance upon the accused, but requires the court to know or inform itself as to the fact of its existence. No presumption is indulged in favor of or against there being a certain ordinance any more than a particular statute. The court is simply bound to ascertain whether there is an ordinance condemning the particular act without the aid of the parties. This disposes of the contention that the statute is unconstitutional because of involving a presumption of guilt. That there was such an ordinance is not questioned. Affirmed.

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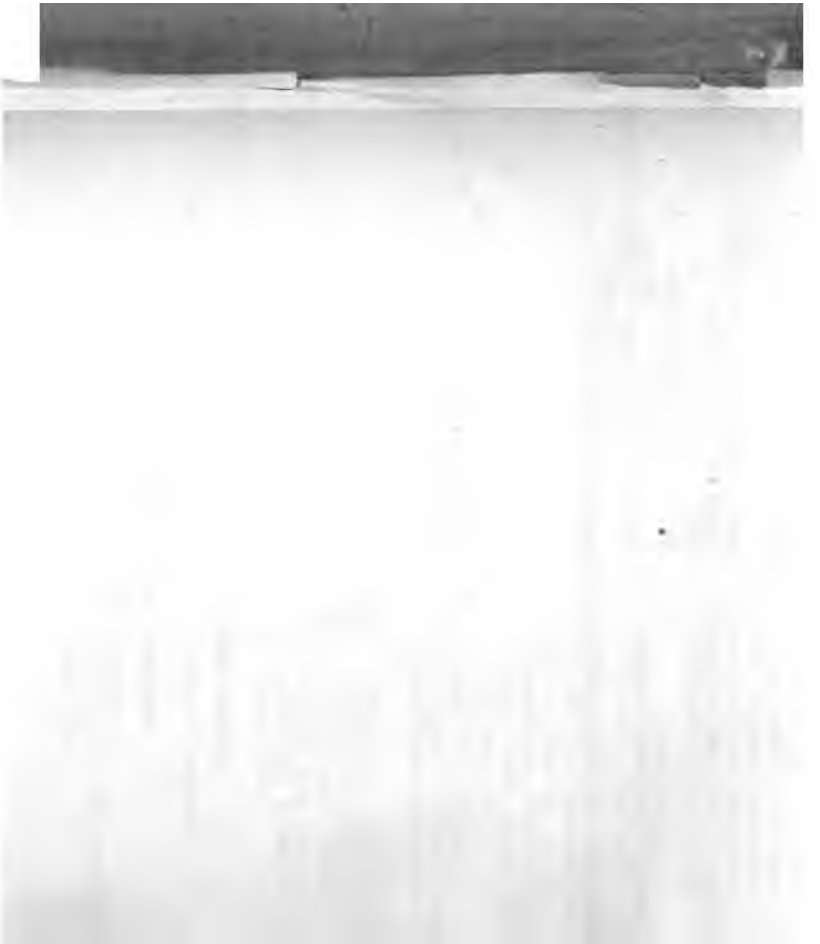

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